RESTITUTION IN TEXAS: CIVIL LIABILITY FOR UNJUST ENRICHMENT

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I. INTRODUCTION

The law of restitution regulates a major area of litigation, but in Texas and elsewhere, this law suffers from a significant degree of confusion. Before becoming the reporter for the Restatement (Third) of Restitution and

Unjust Enrichment (Restatement (Third)), Andrew Kull noted how United States lawyers and judges suffer from a misunderstanding of the law of restitution.[1] That misunderstanding significantly affects litigation because one cannot comprehensively describe the body of court-made rights and remedies without including the law of restitution.[2]

These misunderstandings arise, in part, from the continued use of terminology laden with ancient fictions. Like the law of torts and contracts, the law of restitution imposes civil liability and provides distinctive remedies to address that liability. Unlike torts and contracts, restitution has not benefited from the general acceptance and simplification of the definitions on which its concepts rest. The publication in 2011 of the American Law Institute's Restatement (Third) should help to diminish this uncertainty in the future.[3] Nevertheless, litigators in many states, including Texas, must continue to struggle through what remains an unnecessarily mysterious body of law. This Article seeks in part to reduce that mystery and to find the common themes in relevant Texas rulings.

The Texas Supreme Court appears to have adopted the modern view of restitution, but its rulings lack the detailed guidance needed by lower courts. This Article therefore concludes with suggestions that the Texas Supreme Court should establish an independent and generally applicable cause of action for unjust enrichment, describe clearly the elements of that cause of action, and lend its authority to the modern terms that describe the law of restitution. None of these suggestions requires a radical departure by the Texas Supreme Court from what it has already established in restitution cases.

II. DEVELOPMENT OF THE LAW OF RESTITUTION

Most state judicial systems began adjudicating private disputes by using some part of the court-made law developed in the common law and

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1. Andrew Kull, *Rationalizing Restitution*, 83 CALIF. L. REV. 1191, 1195 (1995).

2. *See id.*

3. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011). The American Law Institute describes its restatements in the following manner:

> Restatements are addressed to courts and others applying existing law. Restatements aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might plausibly be stated by a court. Restatement black-letter formulations assume the stance of describing the law as it is.

AM. LAW INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 4 (2005), *available at* http://www.ali.org/doc/StyleManual.pdf.

equity courts of England. The two judicial systems that grew in England—the common law courts and those of equity—each created substantive law and distinctive remedies.

The courts of the common law, for example, created the substantive law of tort and contract, and the remedy characteristic of these causes of action has long been the award of damages—a monetary judgment measured by the plaintiff's losses. On the other hand, the common law courts developed increasingly rigid procedural forms of action that imposed limiting and strictly enforced requirements on pleading. The courts of equity became established in England as an alternative forum and lawmaker because of the rigidity of the common law forms of action and the problems caused by the common law courts' use of a jury. The courts of equity developed the law of trusts and mortgages and created their own unique remedy—the injunction. The injunction provided an effective remedy when damages were not helpful or adequate, and equity courts wielded the powerful sanction of contempt to punish those who disobeyed their injunctions.

As early as 1845, Texas merged the two systems represented by the common law and equity courts.[4] At least after that time, a Texas court could apply any pertinent substantive law or remedy without regard to the system from which it was derived.[5] Texas courts also avoided the strict pleading requirements that characterized the common law forms of action, but adopted England's court-made law, either from the common law or equity courts, as rules of decision unless these were inconsistent with the Texas Constitution or with a Texas statute.[6]

Lawyers today often think of the common law as a reference to court-made, as opposed to statutory, law. However, all of the rules and remedies created in the common law and equity courts are court-made law in this sense. Although the English court-made law pertaining to restitution differed because of the characteristics and rationalizations of these two court systems, both the common law and the equity courts created substantive law to prevent unjust enrichment. In seeking to achieve this substantive end, however, each applied its own distinctive remedies and its own justifications for the expansion of its judicial power.

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4. Michael Ariens, Lone Star Law: A Legal History of Texas 251 (2011).

5. *See* Rogers v. Daniel Oil & Royalty Co., 110 S.W.2d 891, 894 (Tex. 1937); *see also* Joseph Webb McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEX. L. REV. 24, 31–32 (1960); Robert W. Stayton, *Texas' Approaches to the Parker Ideal and Her Shortcomings*, 37 TEX. L. REV. 845, 845 (1959).

6. *See* Towner v. Sayre, 4 Tex. 28, 29 (1849); Knebel v. Capital Nat'l Bank of Austin, 505 S.W.2d 628, 631 (Tex. Civ. App.—Austin), *rev'd on other grounds*, 518 S.W.2d 795 (Tex. 1974); *see also* McKnight, *supra* note 5, at 26.

A. The Common Law and Quasi-Contracts

Rather than creating a right or obligation and then the judicial procedure for its enforcement, the common law courts created substantive law through the design of their procedures. In particular, their requirements for pleading effectively described the rights and obligations that were legally enforceable. By the seventeenth century, the common law courts had developed their assumpsit form of action. This form of action initially allowed suits and remedies only for the enforcement of express contracts, but was subsequently extended to contracts inferred from the circumstances, the so-called implied-in-fact contract.[7] This "special" assumpsit form was later expanded to authorize judicial enforcement of what had been the action in debt, which became known as a claim in *indebitatus assumpsit*.[8] Although a debt resembles a contract, the early rules treated it as a property right and required the creditor to bring an action in debt in the Common Pleas court where a plaintiff made his case subject to an odd method of proof called the wager of law.[9] These expansions gave the common law courts comprehensive power over what we know today as contract law.

In some cases, however, the defendant gained a benefit at the plaintiff's expense but had not done so through a binding agreement. The common law judges used their ingenuity to create legal fictions that justified, or perhaps shielded, the expansion of their judicial authority over these cases. For example, one who received money through a mistaken payment by the plaintiff was made liable for a fictional debt, thus allowing the common law courts to avoid the unjustified enrichment of a defendant by imposing, as a matter of law, a promise to repay the debt.[10] This fictional promise to pay was then used to create a right resembling the right derived from actual contracts. The manufactured similarity of these "quasi-contracts" was deemed sufficient to fit such cases within the assumpsit form of action, but the new actions were distinguished by being labeled general assumpsit.[11]

A plaintiff used general assumpsit to obtain restitution from a defendant who unjustly held a benefit gained at the plaintiff's expense. Restitution thus resembled the repayment of a debt, except the debt was a

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7. *See* 1 Dan B. Dobbs, Dobbs Law of Remedies: Damages-Equity-Restitution § 4.2(3), at 579 (2d ed. 1993).

8. *See id.* at 578–79.

9. *See id.* at 577. This Monty-Pythonesque method of proof depended on the ability of a litigant to swear convincingly that the case against him was groundless. As it developed in complexity, the wager required swearing by friends or associates of a party ("compurgators"). *See also* Black's Law Dictionary 1574 (7th ed. 1999) (defining *wager of law*).

10. *See* 1 Dobbs, *supra* note 7, § 4.2(3), at 580.

11. *See id.* at 579.

creation of law rather than of the parties. In order to maintain the fiction, the common law courts referred to this right of restitution as one derived from implied-in-law quasi-contracts, which is a distinctly legal way of saying that no true agreement of the parties existed. The common law's remedy for "breach" of a quasi-contract was restitution—that is, the return of the benefit unjustly held by the defendant. Restitution thus became a logical response to a right of action based on preventing unjust enrichment.

More specific forms of action under assumpsit were developed for particular fact patterns. As a group, these became known as the common counts and could be divided into what were known as the debt or *indebitatus* counts, or into the value counts.[12] For example, the debt counts included suits for money paid for the defendant's use or to the defendant.[13] These included true contract cases as well as unjust enrichment cases.[14] Under the value counts, plaintiffs could sue for the value of services or for the value of goods provided to the defendant. The quantum meruit count allowed recovery of the value of services provided, and quantum valebat allowed recovery of the value of goods transferred to the defendant.[15] As with the debt counts, the value counts included true contract claims and restitution claims not based on contract.[16]

B. The Equity Courts and Constructive Trusts

In the thirteenth and fourteenth centuries, the common law courts had gradually become less flexible in accepting new forms of action for emerging problems. The common law system also experienced problems in particular cases because of its use of uneducated laymen on juries.[17] As the common law courts began to provide less adequate relief, these limitations fueled the rise of a separate court system known as the Court of Chancery, which operated under the chief law member of the Kings' council, the chancellor.[18] Once developed, this system became known as the courts of equity.

One of the more significant substantive accomplishments of the equity courts was their development of the law of trusts. Although trust law began as a method of holding and transferring land, it developed into a body of substantive and remedial laws designed to aid in the management of

12. *See id.* at 579–83.
13. *See id.* at 581–82.
14. *Id.* at 582.
15. *Id.* at 583.
16. *See id.* at 583–84.
17. *See* Candace S. Kovacic-Fleischer et al., Equitable Remedies, Restitution and Damages 2 (8th ed. 2011).
18. *Id.* at 3.

personal property as well.[19] In creating the law of express trusts, the courts of equity used their principle of good conscience to require a trustee to do what, in good conscience, he should.[20] Trust law thus created a presumption that protected the beneficiary by placing a burden of good faith on the trustee. Although the trustee held legal title to trust assets and an ever-expanding power over these assets, he was bound by the law as a fiduciary to perform with loyalty and prudence.[21]

The courts of equity were as adept as the common law courts at expanding their judicial power. They did so in a similar fashion as well; they used legal fictions to create superficial similarities between new rights and more established rights. For example, the equity courts created their constructive trust remedy to capture property purchased with trust funds by a trustee.[22] Later, they extended this injunctive remedy to bind parties who had never agreed to a trust arrangement.[23] As the common law courts had reached beyond contracts to prevent unjust enrichment, the equity courts used the constructive trust to accomplish the same purpose.[24] They thus captured property that was unjustly held by a defendant in the same way they could retrieve property wrongly taken by a trustee. In this fictional trust, the plaintiff was the beneficiary, and the unjustly enriched defendant became the implied-in-law trustee.

III. OVERVIEW OF RESTITUTION AND UNJUST ENRICHMENT

A. Cause of Action to Prevent Unjust Enrichment

1. Is "Unjust Enrichment" Too Vague?

One best understands restitution by viewing it as inextricably bound up with a general right to prevent unjust enrichment. "Restitution is the law of

19. *See* 1 Dobbs, *supra* note 7, § 2.3(2), at 75.

20. *See id.* at 77.

21. *See* John H. Langbein et al., History of the Common Law: The Development of Anglo-American Legal Institutions 310 (2009).

22. *See* TEX. PROP. CODE ANN. § 114.008(a)(9) (West 2007) (stating that as one remedy for a breach of trust, a court can "impose a lien or a constructive trust on trust property, or trace trust property of which the trustee wrongfully disposed and recover the property or the proceeds from the property").

23. *See* Hatton v. Turner, 622 S.W.2d 450, 458 (Tex. Civ. App.—Tyler 1981, no writ) ("A constructive trust is not in reality a trust but is an equitable remedy against unjust enrichment. . . . It is not necessary to the establishment of a constructive trust that an express or conventional trust relationship shall exist between the parties, or that any promise shall have been made by the one for the benefit of the other.").

24. *See* 1 Dobbs, *supra* note 7, § 4.3(2), at 590.

nonconsensual [transfers of property] and nonbargained benefits . . . ."[25] It protects property rights against those who have by accident or through wrongdoing gained control over the money, property, or benefit in controversy and have thus been unjustly enriched.

Although this Article argues for the adoption of the more understandable modern terminology of *unjust enrichment*, some might contend that uncertainty inheres in any effort to distinguish those enrichments that are unjust from those that are not. In this respect, the Restatement (Third) concedes that "unjustified" enrichment more accurately describes restitution's actual focus.[26] "Unjustified enrichment is enrichment that lacks an adequate legal basis; it results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights."[27] The Restatement (Third) retained *unjust enrichment* because that usage has been "imposed by the first Restatement of Restitution."[28] Nevertheless, a finding of unjust enrichment requires examination of the justifications for that enrichment, and that effort is no more unpredictable than a finding of negligence in a tort case. One concludes that no justification exists for a particular enrichment through the application of clarifying rules that arise from limiting principles and specific defenses.[29]

As an example of this rule-based predictability, consider the limiting principle that withdraws restitution from one who acts as volunteer. Consider this to be Hypothetical 1. Suppose your client returned from a vacation to discover that a house painter (the plaintiff) has painted her house without permission and has billed her $5,000—the actual value added to her house. If she refuses to pay, the plaintiff might sue your client for the $5,000 benefit she currently enjoys at the plaintiff's expense, claiming that your client has been unjustly enriched.

Even if the client has been enriched, the critical question is whether retaining that (nonreturnable) benefit without compensating the plaintiff would be unjust. Answering this question involves an identification of the justifications for allowing her to keep the benefit without paying. First, your client did not ask for the benefit and was not given the opportunity to reject

25. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. d (2011).

26. *See id.* § 1 cmt. b. In Comment b, the Restatement (Third) recognizes the greater explanatory power of the phrase *unjustified enrichment*. This adjective more helpfully describes the focus of liability for restitution by making clear the concern with an enrichment that lacks a legal, rather than a moral, justification.

27. *Id.*

28. *Id.*

29. *See generally id.* §§ 62–67 (describing standard defenses to a claim in restitution and related rules governing value and notice).

it. Because the benefit is nonreturnable—in that she cannot peel the paint off her house—she would be forced to incur a cost she might have deferred if given the chance. Second, the plaintiff intentionally sought to place this expense on your client by denying her right to engage in contractual negotiation or to reject this arrangement. Finally, the plaintiff in this case engaged in a wrongful action, trespass, in order to impose this benefit on your client. The law of restitution speaks of this situation through a shorthand label by denying a remedy to a "volunteer" or an "officious intermeddler," but the analysis relies on specific rule-based justifications to support or deny restitution.[30]

Under the law of restitution, Hypothetical 1 would be an easy case. A harder case would arise if the plaintiff could prove the improvement was made because of a mistake.[31] For example, assume the plaintiff painted the wrong house believing it belonged to someone who had requested that work. In this instance, the law recognizes an equitable justification on his part, but his conferral of a nonreturnable benefit means his requested remedy nevertheless results in an involuntary exchange, forcing the defendant to pay for a benefit she did not request.[32] In this harder case, a court must decide who will prevail in a conflict between two innocent parties, each having some justification for their position. That decision will require some use of the court's equitable power and some resort to its sense of justice. Nevertheless, legal rules and precedents will inform the court in narrowing the issue and in making that hard decision, much as they do in other areas of the law.

2. *What Elements Describe the Cause?*

Section 1 of the Restatement (Third) states that "[a] person who is unjustly enriched at the expense of another is subject to liability in restitution."[33] Although the Restatement (Third) does not describe these specifics as elements of a cause of action, section 1 does describe the factual characteristics and legal conclusions that establish a prima facie

30. *See id.* § 2(3) ("There is no liability in restitution for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant's intervention in the absence of contract."). If the claimant has neglected to discuss or has intentionally avoided a contractual arrangement, restitution will not be available because contracting for these obligations is preferred over restitution. *See id.* § 2 cmt. b. As discussed below, the existence of a valid and enforceable contract prevents the claim that one party has been unjustly enriched by virtue of the contract's operation. The Restatement (Third) recites the following limiting principle: "A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment." *Id.* § 2(2).

31. *See id.* § 10.

32. *See id.* § 10 cmt. a.

33. *Id.* § 1.

claim for restitution. The defendant's liability thus depends on the acquisition of a benefit at the expense of the plaintiff and, finally, on the court's conclusion that retention of this benefit constitutes unjust enrichment.[34]

These three elements describe the core requirements that any plaintiff must fulfill before the remedies of restitution become available.[35] Some courts insist on referring to unjust enrichment as a mere theory justifying restitution, but calling the concept a theory obscures its practical importance. Proving the civil liability that authorizes a court to award restitution requires more than a moral or theoretical decision about whether some person deserves a particular enrichment. One proceeds as with any other legal conflict to determine unjust enrichment by considering facts and narrowing issues in light of rules and precedents. Unjust enrichment thereby stands not for an abstract theory but for a conclusion of liability reached after the application of legal rules.

In applying the first two elements of the unjust enrichment cause of action, one investigates the relationship of the parties, and this effort may well end the claim. The plaintiff has standing to sue only to recover that benefit to which he has an arguable right. The plaintiff must have lost something, and therefore no disinterested person can challenge the enrichment of another. Furthermore, the defendant must have obtained a benefit at the expense of the plaintiff in a manner that was not foreordained by contract. As noted throughout this Article, a valid and enforceable contract bars a suit for unjust enrichment.

Consider the following example as Hypothetical 2. Assume two parties, one being the active operator and the other an investor, jointly participate in the purchase of an oil and gas lease in accordance with a

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34. The Colorado Supreme Court in its decision in *Lewis v. Lewis* explained its unjust enrichment claim in the following manner: "We have previously determined that a party claiming unjust enrichment must prove that (1) the defendant received a benefit (2) at the plaintiff's expense (3) under circumstances that would make it unjust for the defendant to retain the benefit without commensurate compensation." Lewis v. Lewis, 189 P.3d 1134, 1141 (Colo. 2008) (en banc). If one worries that this is a vague and open-ended claim, compare it with the universally accepted claim for negligence. Courts describe a negligence claim as one requiring a showing that (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, and (3) thereby proximately caused the plaintiff's injuries. *See* MICHOL O'CONNOR, O'Connor's Texas Causes of Action 657 (2012).

35. The Restatement (Third) voices some hesitation about the use of checklists to determine liability for restitution. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. d (2011). The danger, however, arises from the inclusion of particularized factors such as one requiring the defendant to have "appreciated" the benefit received. *See id.* The elements listed by the Colorado Supreme Court in *Lewis* serve the important function of alerting litigants and lower courts to that which must be pleaded and proved. Furthermore, these elements are free of unnecessary and mischievous limiting factors and closely track what the Restatement (Third) posits as the fundamental principles of liability.

contractual agreement. Assume the active operator acquires a second oil and gas lease without including the investor.[36] If their agreement says nothing about other ventures, the first purchase does not prove that the active party owes the investing party a portion of the profits obtained from another lease. Although the investor may feel betrayed by not being included on the second lease, that party has no arguable right under these facts to the benefit being sought.[37] Even if the active party acquires a benefit from the second lease, that benefit was not obtained at the expense of the investing party. In this fashion, the first two elements, though seemingly factual, can answer the question posed by the third element to prove no unjust enrichment occurred.

3. *Should the Cause of Action Be Independent?*

The independence of the cause of action for unjust enrichment becomes especially important when the defendant has obtained a benefit because of the plaintiff's mistake.[38] Under these circumstances, the plaintiff may have no tort or contract claim. For example, suppose your client attempted an online transfer of $200,000 to her local bank account but misstated her account number. Consider these facts as Hypothetical 3. This transmission error caused the deposit of her money in the account of an unrelated party, who then moved the money into certificates of deposit, thereby placing the money beyond the immediate power of the bank. Removing money from one's own bank account does not appear to be a wrongful act or in violation of any agreement an account holder generally has with his bank. This recipient did, however, obtain a benefit at the expense of your client, and no legal justification exists that is sufficient to allow retention of that benefit.[39]

Even if one argued that in Hypothetical 3 a tort claim did support your client's suit for her $200,000, the remedy in tort would typically consist of a

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36. These facts are taken from *Rankin v. Naftalis*. *See* Rankin v. Naftalis, 557 S.W.2d 940, 942–43 (Tex. 1977).

37. *See id.* at 946. The second lease was outside the operating agreement and therefore outside any fiduciary relationship. *Id.*

38. *See, e.g.*, Bryan v. Citizens Nat'l Bank in Abilene, 628 S.W.2d 761, 763 (Tex. 1982) ("Generally, a party who pays funds under a mistake of fact may recover restitution of those funds if the party to whom payment was made has not materially changed his position in reliance thereon. The purpose of such restitution is to prevent unconscionable loss to the party paying out the funds and unjust enrichment to the party receiving the payment." (citations omitted)).

39. *See* Castano v. Wells Fargo Bank, 82 S.W.3d 40 (Tex. App.—San Antonio 2002, no pet.). The facts of Hypothetical 3 come from the *Castano* case. *Id.* at 41. In *Castano*, the plaintiff sued the bank, which then impleaded the recipient of the funds. *Id.* at 42. The court of appeals affirmed the trial court's imposition of a constructive trust, which forced the recipient to return the certificates of deposit to the plaintiff. *Id.* at 43.

monetary judgment for the principal plus interest. In contrast, the unjust enrichment cause of action supports restitution or return of the benefit acquired by the defendant. In this case, the plaintiff would seek a constructive trust, which amounts to an injunction ordering the defendant to return the certificates of deposit that he unjustly holds. Which claim and remedy favors the plaintiff: the CDs handed over under threat of contempt or a money judgment against someone who might during the enforcement process spend your client's money on a vacation tour of Europe?

Another valuable aspect of restitution has to do with what is called the right to force disgorgement of profits. Assume, as Hypothetical 4, a geologist employee of an oil company uses confidential company information to aid his collaborators in buying oil and gas leases. These ill-gotten gains, the leases, now have a value approaching one million dollars, but the geological data that was purloined had a relatively negligible value. A tort claim for this theft would seem limited to the value of the data converted at the time of conversion, but restitution from a conscious wrongdoer who converts a plaintiff's property includes disgorgement of any profits made through the use of the purloined property.[40] In this fashion, restitution can offer a recovery far greater than the plaintiff's loss.

Unjust enrichment does not provide an independent claim when a valid and enforceable contract covers the subject matter of the dispute. This limitation applies because the law of contract assumes that one party may often benefit at the other party's expense, and contract law would be undermined if the losing party could ignore a binding agreement in order to seek the other party's gains. However, contractual claims do not always succeed, and some contracts may be susceptible to rescission because of mutual mistake or fraud. Where appropriate, therefore, a plaintiff should consider an unjust enrichment claim as an alternative in case the contract proves unenforceable.

The existence of a generally applicable cause of action for unjust enrichment would avoid the need for special unjust enrichment claims, such as quantum meruit or money had and received. As recognized in Texas, the elements of the special unjust enrichment claim for money had and received differ little from the three elements of an unjust enrichment claim except that such a claim does not support the equitable remedies of restitution. Furthermore, the use of the arcane common-count terminology adds another

40. *See, e.g.*, Hunter v. Shell Oil Co., 198 F.2d 485, 489 (5th Cir. 1952) ("When property has thus been wrongfully acquired, equity converts the holder into a trustee, and compels him to account for all gains from such conduct."); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 (2011) ("A person is not permitted to profit by his own wrong.").

layer of mystery to this sort of litigation, as do the Latinate title and ancient origins of the claim of quantum meruit.

4. Policy Reasons Supporting the General Claim

One can easily conjure reasons for having a clearly established legal remedy to prevent unjust enrichment.[41] First, it prevents unjustified deprivations of money, property, or other benefits. Second, this cause of action supplements existing rights by providing a remedy where neither tort nor contract would. Finally, at a high level of generality, liability for unjust enrichment depends on a simple premise of fairness that applies additional protection for one's property. To some, applying that premise in law appears dangerous because of its generality, but that generality provides flexibility and, in practice, is constrained by limiting rules and defenses.

B. Restitution

The law of restitution encompasses both a cause of action and a set of remedies. However, the definition of the term fits more comfortably as a reference to a distinct set of court-made remedies. These remedies prevent unjust enrichment, value profits acquired through use of wrongfully taken funds, and secure either property or a lien on property. The following is a list of the means that may be used to achieve restitution:

- Monetary award;
- Equitable accounting;
- Constructive trust—traced property;
- Equitable lien—traced property;
- Equitable subrogation—traced to lien removal;
- Reformation of documents; and
- Rescission of contracts.

The basic monetary award for restitution returns to the plaintiff the amount of the defendant's gain in a judgment. To calculate this basic award, one determines the value of the defendant's unjust enrichment at the plaintiff's expense.[42] In many instances, the defendant's enrichment will equal the plaintiff's loss. However, a conscious wrongdoer who has enhanced the value of the property taken at the plaintiff's expense or

41. *See* James Steven Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution and Unjust Enrichment*, 42 WAKE FOREST L. REV. 55, 57 (2007) ("The central substantive notion is that one must not (unjustifiably) harm another. The correlative remedial principle might be expressed as 'a party who unjustifiably harms another owes a duty to pay a sum of money that will compensate the other for the harm.'").

42. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 49(1) (2011).

profited from its use must disgorge those profits to the plaintiff.[43] As noted in the discussion of Hypothetical 4, this disgorgement of profits occurs because the law seeks to prevent a wrongdoer from benefitting, even marginally, from his wrong.[44] Even so, disgorgement does not place the wrongdoer in a worse position than had he not wrongfully taken the plaintiff's property and, for that reason, should not be considered a punitive damages award subject to the Texas statutory procedures and limitations.[45]

If a plaintiff can trace the benefit taken to identifiable property held by the defendant, a court can impress a constructive trust on that property. The court thus declares plaintiff's superior title to that property and orders the transfer of title by the defendant to the plaintiff.[46] Again, the plaintiff can recover any increase in the property's value when the defendant wrongfully acted to acquire that property. For example, as Hypothetical 5, assume the defendant had embezzled $100,000 from the plaintiff and can be shown to have invested that money to create an Apple stock account. If the value of the stock has doubled by the time of suit, the plaintiff will ask the court to award a constructive trust on the entire account, now worth $200,000. If the plaintiff's money was instead used to purchase only 60% of the Apple stock in the account, the court can create an equitable lien in favor of the plaintiff on 60% of the account or $120,000.[47] Both the constructive trust and the equitable lien give the plaintiff priority over the defendant's other creditors.[48]

Professor Dobbs presents the case of a defendant who embezzles $100,000 and uses this money to pay off the bank note on his home and thereby gains release of the bank's lien.[49] Unlike a claim for either a constructive trust or an equitable lien, the plaintiff's money was not exchanged for title to property now held by the defendant. Instead, the money removed a debt on defendant's property. In this hypothetical, however, the court can apply equitable subrogation both to award the plaintiff a judgment for the $100,000 and to secure the debt with a lien on

43. *See id.* § 49(4).

44. *See id.* §§ 3, 51(4).

45. Disgorgement of profits causes the defendant no net loss and therefore does not amount to an award of punitive damages. *See id.* § 51 cmt. k. In *International Bankers Life Insurance Co. v. Holloway*, the Texas Supreme Court held that forcing disgorgement of profits through equity did not limit the plaintiff from also seeking punitive damages. 368 S.W.2d 567, 584 (Tex. 1963).

46. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. b (2011).

47. *See id.* § 56.

48. *But see id.* § 61 (stating that a plaintiff's right to traceable profits at the expense of an insolvent defendant is subordinated to the claims of innocent dependents and creditors).

49. *See* 1 DOBBS, *supra* note 7, § 4.3(4), at 604–06.

the defendant's home.[50] By imposing the lien, the court awards the plaintiff the bank's rights as they existed before it released its lien.

The Texas Supreme Court has also recognized the equitable nature of the remedy of rescission.[51] Rescission allows a court to set aside a contract because of mutual mistake or wrongdoing, and restitution comes into play because it would be unjust to allow one party to retain any benefit gained before rescission.[52] In addition to rescission, a court can reform a document that was mistakenly drafted. For example, the Texas Supreme Court ordered rescission of a deed that erroneously conveyed only one property even though the grantors intended to convey two properties to the purchaser at foreclosure.[53] The Court refused to allow the parties to use a correction deed for these purposes, but held that rescission and reformation were appropriate to avoid the unjust enrichment of the debtor.[54] Reformation allows the contract to stand, but corrects any mistake. In an earlier case, the Supreme Court reformed a document that erroneously stated that a debtor had fully paid the note held by his bank.[55] If enforced, such mistakes can unjustifiably enrich a party to the agreement or a third party, and reformation operates to prevent that unjust enrichment.

IV. LOWER TEXAS COURTS: NO INDEPENDENT CAUSE OF ACTION

Most of the Texas courts of appeals and federal courts that have considered the question under Texas law have rejected the existence of an independent cause of action for unjust enrichment. It is difficult to understand what independence means in this context. Some courts refer to unjust enrichment as merely a theory of recovery rather than as the basis for recovery or as a description of the result when restitution is denied. Others suggest that the field consists solely of special claims, such as the money-had-and-received and quantum meruit causes of action.

Black's Law Dictionary indicates that *independent* can mean either that something is "[n]ot associated with another (often larger) entity" or that it is "[n]ot dependent or contingent on something else."[56] When lower Texas courts deny that unjust enrichment is an independent cause of action, they may therefore mean that unjust enrichment must be viewed in light of its association with contract law. However, unjust enrichment claims have

50. *See id.* at 606.

51. *See* Smith v. Nat'l Resort Cmtys., Inc., 585 S.W.2d 655, 660 (Tex. 1979).

52. *See id.*; 1 DOBBS, *supra* note 7, § 4.3(6), at 614–15.

53. *See* Myrad Props., Inc. v. LaSalle Bank Nat'l Ass'n, 300 S.W.3d 746, 752–53 (Tex. 2009).

54. *See id.* at 750–51, 753.

55. *See* First State Bank of Amarillo v. Jones, 183 S.W. 874, 876–77 (Tex. 1916).

56. Black's Law Dictionary 774 (7th ed. 1999).

only a historical and fictional association with contract claims; the two do not share common elements beyond that history. The denial of independence might mean that unjust enrichment claims or the remedies of restitution depend on the proof of either a claim in tort or contract. This argument means that the unjust enrichment cause of action merely adds an element or theory to tort or contract claims as needed to trigger restitution. None of these explanations can be supported by the decisions of the Texas Supreme Court.

A. Unjust Enrichment as a Theory of Recovery

In 2002, the Corpus Christi Court of Appeals decided the case of *Mowbray v. Avery*[57] and included in its opinion an often-cited discussion of unjust enrichment.[58] The Corpus Christi court considered whether it was controlled by language from Texas Supreme Court decisions suggesting that unjust enrichment was a cause of action but decided that it was not.[59] Instead, the Corpus Christi court emphasized that the Texas Supreme Court had referred to unjust enrichment as a remedy as well as a basis for liability.[60] Because of these different uses, the court of appeals refused to accept "these statements as recognition of unjust enrichment as an independent cause of action, but [saw them] simply as a reiteration of the well[-]established principle that a suit for restitution may be raised against a party based on the theory of unjust enrichment."[61] The Corpus Christi court thus concluded that "unjust enrichment [was] not a distinct independent cause of action," and characterized it instead as "a theory of recovery."[62]

The court of appeals failed to explain how one would plead and prove such a "suit for restitution" or why any theory that allowed recovery was not a cause of action. In this regard, one federal court has noted, "Texas courts may waffle about whether unjust enrichment is a theory of recovery or an independent cause of action, but either way, they have provided the plaintiff with relief when the defendant has been unjustly enriched."[63] The Corpus Christi Court of Appeals' ruling seems to support this observation

57. Mowbray v. Avery, 76 S.W.3d 663 (Tex. App.—Corpus Christi 2002, pet. denied).

58. Recent decisions by Texas courts of appeals have repeated the statement that unjust enrichment is not an independent cause of action and have used *Mowbray* as authority. *See, e.g.*, Casstevens v. Smith, 269 S.W.3d 222, 229 (Tex. App.—Texarkana 2008, pet. denied); R.M. Dudley Constr. Co. v. Dawson, 258 S.W.3d 694, 703 (Tex. App.—Waco 2008, pet. denied); Argyle Indep. Sch. Dist. v. Wolf, 234 S.W.3d 229, 246 (Tex. App.—Fort Worth 2007, no pet.).

59. *See Mowbray*, 76 S.W.3d at 680.

60. *Id.* at 680 n.25.

61. *Id.*

62. *See id.* at 679.

63. Newington Ltd. v. Forrester, No. 3:08-CV-0864-G ECF, 2008 WL 4908200 at *4 (N.D. Tex. Nov. 13, 2008).

by concluding that recovery can be supported under an unjust enrichment theory when the defendant "has obtained a benefit from another due to fraud, duress or taking of undue advantage."[64]

This language appears to accept restitution for reasons that do not differ significantly from unjust enrichment. The court of appeals approved restitution of a benefit that "would be unconscionable for the receiving party to retain"[65] when circumstances created an "implied or quasi-contractual obligation to repay."[66] Without demanding proof of tortious acts by the defendant, the court of appeals also recognized that "[t]he unjust enrichment doctrine applies the principles of restitution to disputes where there is no actual contract."[67] In this manner, the court of appeals seemed to recognize that a legal basis for restitution exists outside tort or contract—that is, "independent" of those two bodies of law.

1. Not a Contract or a Tort

In following *Mowbray*, other Texas courts have accepted its language and have seemingly accepted restitution as a remedy for a quasi-contract cause of action that is neither tort nor contract. In *Walker v. Cotter Properties, Inc.*,[68] the Dallas Court of Appeals made the following statement: "Unjust enrichment is not an independent cause of action but rather characterizes the result of a failure to make restitution of benefits either wrongfully or passively received under circumstances which give rise to an implied or quasi-contractual obligation to repay."[69] The court thereby characterized restitution as a remedy to prevent unjust enrichment and stated that the remedy applies whether the defendant acted wrongfully or not. Because one who passively receives a benefit ordinarily does not thereby commit a tort, the Dallas Court of Appeals necessarily recognized that the liability it was discussing may not rest in the law of tort. The reference to an "implied or quasi-contractual obligation to pay" effectively separates the obligation from one based on an agreement of the parties. Instead, such an obligation to pay arises as a matter of law to avoid what would otherwise be an unjust enrichment.[70]

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64. *Mowbray*, 76 S.W.3d at 679 (citing Heldenfels Bros. v. City of Corpus Christi, 832 S.W.2d 39, 41 (Tex. 1992)).

65. *Id.* at 679.

66. *Id.*

67. *Id.*

68. Walker v. Cotter Props., Inc., 181 S.W.3d 895 (Tex. App.—Dallas 2006, no pet.).

69. *Id.* at 900.

70. *See id.*

Numerous Texas courts have quoted this language from *Walker* in rejecting an independent claim for unjust enrichment.[71] As suggested above, one argument for this conclusion would be that unjust enrichment claims are always *dependent* on other causes of action. This explanation fails for at least three reasons. First, since a valid contract preempts such claims, unjust enrichment could only be dependent on tort claims.[72] If the contract is faulty, an unjust enrichment claim can apply, but its basis would be unjust enrichment and not contract law. Second, contending that unjust enrichment depends on the existence of a valid tort claim fails to account for the plaintiff's historical right to "waive the tort" and assert unjust enrichment instead.[73] Third, the view that restitution is merely an alternative remedy in tort or contract has been directly contradicted by Texas Supreme Court rulings justifying restitution when unjust enrichment was the result of the *claimant's* mistake.[74]

Restitution allows a claimant to recover because of her own mistake. Tort claims, on the other hand, allow recovery when the defendant's mistake causes the plaintiff harm and amounts to negligence, defective design, or failure to warn. Restitution restores a benefit to a plaintiff even though an innocent defendant passively received that benefit as a result of the plaintiff's own mistake. This distinction was noted in the discussion of Hypothetical 3, where the plaintiff through a wire transfer erroneously directed her money into the defendant's bank account.[75]

2. *Quasi-Contract*

Even the Dallas Court of Appeals in *Walker* recognized a general cause of action, but labeled it as one arising from "an implied or quasi-

71. *See* Casstevens v. Smith, 269 S.W.3d 222, 229 (Tex. App.—Texarkana 2008, pet. denied); R.M. Dudley Constr. Co. v. Dawson, 258 S.W.3d 694, 703 (Tex. App.—Waco 2008, pet. denied); Argyle Indep. Sch. Dist. v. Wolf, 234 S.W.3d 229, 246 (Tex. App.—Fort Worth 2007, no pet.); Friberg-Cooper Water Supply Corp. v. Elledge, 197 S.W.3d 826, 832 (Tex. App.—Fort Worth 2006), *rev'd on other grounds*, 240 S.W.3d 869 (Tex. 2007). The federal courts in the Fifth Circuit, when applying Texas law, have concluded that unjust enrichment is not an independent cause of action but is instead the theory supporting special unjust enrichment claims. *See* Hancock v. Chi. Title Ins. Co., 635 F. Supp. 2d 539, 560 (N.D. Tex. 2009).

72. *See In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 740 (Tex. 2005).

73. *See* Ferrous Prods. Co. v. Gulf States Trading Co., 323 S.W.2d 292, 296 (Tex. Civ. App.—Houston [1st Dist.] 1959), *aff'd*, 332 S.W.2d 310 (Tex. 1960); *see also* William A. Keener, *Waiver of Tort*, 6 HARV. L. REV. 223, 232 (1893).

74. *See* Myrad Props., Inc. v. LaSalle Bank Nat'l Ass'n, 300 S.W.3d 746, 753 (Tex. 2009); Meadows v. Bierschwale, 516 S.W.2d 125, 128 (Tex. 1974). If the remedies of restitution depended on the commission of a tort, the impressing of a constructive trust in *Castano v. Wells Fargo Bank* would also have to be deemed erroneous. 82 S.W.3d 40 (Tex. App.—San Antonio 2002, no pet.)

75. *See supra* text accompanying notes 38–39; *see also Castano*, 82 S.W.3d at 41.

contractual obligation to repay."[76] As explained above, these quasi-contract and implied (in law) rights do not arise from contracts intentionally entered into by willing parties or because of the tortious acts of the defendant. Neither contract nor tort law authorizes such an "obligation to repay." Quite simply put, courts impose the obligation in order to serve the policies that demand restitution from those who have been unjustly enriched.

The Dallas Court of Appeals, when it decided *Walker*, disclosed through its reasoning those factors it deemed relevant to recovery on quasi-contract.[77] The case arose because third parties made fraudulent inducements to these litigants, thereby causing them to engage in worthless investments.[78] The plaintiff, Jerry Walker, settled his claims against the third parties and as part of his compensation was assigned their claim against the Cotters.[79] As an assignee, Walker sued the Cotters based on "theories of quasi-contract, unjust enrichment, and conversion."[80] He based his argument on the assertion that the Cotters profited from what was little more than a Ponzi scheme. After a bench trial, the trial court granted a directed verdict in favor of the Cotters and held that they were not unjustly enriched by funds paid them by the third party.[81]

In upholding the take-nothing judgment entered against the plaintiff, the Dallas Court of Appeals noted that his cause of action was one based on quasi-contract "to prevent a party from obtaining a benefit from another by fraud, duress, unjust enrichment, or because of an undue advantage."[82] In this respect at least, the Dallas court's reasoning in *Walker* tracks that of the Corpus Christi Court of Appeals in *Mowbray*. Both conclude that a cause of action exists to prevent unjust enrichment, but both label it quasi-contract.[83] As a consequence, these two courts, and the courts that follow *Walker* or *Mowbray*, have accepted an independent cause of action that supports restitution to remedy unjust enrichment even though they seem unwilling to label it as such.

Labeling the cause as one in quasi-contract adds confusion to, or at least sheds no light on, the subject. That label informs one about what the cause is not (not a contract) rather than what it is. As noted above, the quasi-contract label's original function was to act as a linguistic cloak for

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76. *See* Walker v. Cotter Prop. Inc., 181 S.W.3d 895, 900 (Tex. App.—Dallas 2006, no pet.).
77. *Id.*
78. *Id.* at 898.
79. *Id.*
80. *See id.*
81. *See id.* at 898–99.
82. *See id.* at 900.
83. *See id.*; Mowbray v. Avery, 76 S.W.3d 663, 679 (Tex. App.—Corpus Christi 2002, pet. denied).

the expansion of the common law courts' jurisdiction over unjust enrichment. The common law courts thought, perhaps, that unjust enrichment involved a wrong that sufficiently resembled a breach of contract. *Quasi* means that one thing resembles, but is not actually the same as, something else.[84] Using such terminology might have been necessary to shield the courts from criticism or from a hostile reaction by the kings or queens of England, but these fictions have long ago outlived their usefulness.

The *Mowbray* and *Walker* decisions characterize unjust enrichment as either the theory behind, or an element of, a general claim labeled quasi-contract. Even if this were merely a contest about the proper name for a claim to prevent unjust enrichment, the quasi-contract terminology would be the wrong choice. The historical authority these courts draw upon for a claim in quasi-contract firmly limits that right of action to the common law. That historical source therefore prevents a quasi-contract claim from supporting an equitable remedy. As a consequence, using the quasi-contract label appears to leave the equitable remedies of restitution unsupported. The Texas Supreme Court has clearly recognized those equitable remedies and has used them to prevent unjust enrichment. On the other hand, labeling the independent claim more in accordance with its function—as one for the prevention of unjust enrichment—would more clearly identify a claim that could also support both the common law and the equitable remedies of restitution.

B. Special Unjust Enrichment Claims

Another reason for denying independence to an unjust enrichment cause of action comes from the conclusion that the field really has been occupied by special unjust enrichment claims. However, that argument falters once one recognizes, as above, the historical background that provides the basis for these claims in the first place. The money-had-and-received and quantum meruit claims recognized in Texas arose originally as common counts in the common law's special assumpsit form of action. That historical background appears to restrict these claims so that, as with a quasi-contract claim, they would not support the numerous equitable restitution remedies that have been recognized and applied by the Texas Supreme Court.

84. *See* BLACK'S LAW DICTIONARY 1257 (7th ed. 1999).

1. Money Had and Received

Over fifty years ago, the Texas Supreme Court described the cause of action for money had and received as one that depends on findings that (1) money held by the defendant (2) belongs to the plaintiff (3) as a matter of "equity, justice, and law."[85] In that case, *Staats v. Miller*, the supreme court noted that the money-had-and-received cause was substantially free of restrictive rules and formalities because it depends on the "abstract justice of the case."[86] Proof of the defendant's wrongdoing in acquiring the plaintiff's money or benefit may add equitable weight to the plaintiff's case, but wrongdoing is not a requirement for the remedy.[87] This cause of action therefore allows restitution so the plaintiff can recover the money unjustly held by the defendant.[88]

The money-had-and-received cause is specialized in the limited sense that its language refers to money rather than to real or personal property, but Texas courts have accepted its application in cases in which tangible property has been taken and converted into money by the defendant.[89] In *Tri-State Chemicals, Inc. v. Western Organics, Inc.*, the Amarillo Court of Appeals overturned a summary judgment for the defendant based on the trial court's finding[90] that the plaintiff's money-had-and-received claim failed because it sought recovery of property rather than money. The Amarillo Court of Appeals noted that the plaintiff had asserted two causes of action, one in assumpsit and a second for money had and received, and concluded that Texas courts looked past "names and procedural technicalities."[91] It held that "irrespective of the name appended to the

85. Staats v. Miller, 243 S.W.2d 686, 687 (Tex. 1951). The three elements announced by the Texas Supreme Court closely track the three elements of the modern cause of action for unjust enrichment. In fact, the Texas money-had-and-received cause of action, if expanded to include other property could function as an independent cause of action if it also supported equitable remedies.

86. *Id.* The justice of the case may not be so abstract as the supreme court implies. *See also* H.E. Austin v. Duval, 735 S.W.2d 647, 649 (Tex. App.—Austin 1987, writ denied) (plaintiffs must show that the money belonged to them when it was obtained by the defendant).

87. *See* Stonebridge Life Ins. Co. v. Pitts, 236 S.W.3d 201, 207 (Tex. 2007); Edwards v. Mid-Continent Office Distribs., L.P., 252 S.W.3d 833, 837 (Tex. App.—Dallas 2008, pet. denied).

88. *See* Sw. Elec. Power Co. v. Burlington N. R.R., 966 S.W.2d 467, 469–70 (Tex. 1998); *see also Stonebridge*, 236 S.W.3d at 207 (overruling the class certification of a money-had-and-received class); Best Buy Co. v. Barrera, 248 S.W.3d 160, 163 (Tex. 2007) (same).

89. *See* Tri-State Chems., Inc. v. W. Organics, Inc., 83 S.W.3d 189, 194–95 (Tex. App.—Amarillo 2002, pet. denied).

90. The trial judge sent the parties a letter stating that the plaintiff's reliance on a money-had-and-received claim was "misplaced" because the defendant held no money or its equivalent. *See id.* at 193.

91. *Id.* at 194.

second claim, [the plaintiff] effectively seeks the recovery of its property wrongfully taken" and that Texas law allowed such a recovery.[92]

In *Edwards v. Mid-Continent Office Distributors, L.P.*, the Dallas Court of Appeals noted that many Texas courts use the money-had-and-received label interchangeably with a right to restitution, claim in assumpsit, or one for unjust enrichment.[93] In the case, the plaintiff alleged that a third party had deceived him into paying debts the third party owed the two defendants.[94] The plaintiff sued the recipients of his money, rather than the third party, presumably because they were in possession of his money and could pay a judgment.[95] The Dallas Court of Appeals in *Edwards* concluded that the trial court had not unreasonably balanced the equities in the case to find against the plaintiff.[96] As the court in *Edwards* noted, calling the claim one for money had and received, restitution, quasi-contract, or unjust enrichment should have little effect on the analysis.[97]

Nevertheless, in *Hancock v. Chicago Title Insurance Co.*,[98] the United States District Court for the Northern District of Texas stated that the Texas Supreme Court has never "recognized a claim for unjust enrichment as independent from an action for money had and received."[99] This ruling would, if adopted, reduce unjust enrichment to either an alternative label or a theoretical justification for the money-had-and-received cause of action under Texas law. That ruling might also logically support the conclusion that these special causes of action occupy the field in preventing unjust enrichment.[100] Assumpsit's common counts of money had and received and quantum meruit, as noted, originated in the common law courts and historically provide no support for equitable restitution.

2. *Quantum Meruit*

Under Texas law, when the claim is not based on a breach of contract, one pleads a cause of action in quantum meruit to recover compensation for goods or services provided to the defendant. That means this cause of action fits within the historical category of a quasi-contract. Instead of a contract,

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92. *Id.* at 195.

93. Edwards v. Mid-Continent Office Distribs., L.P., 252 S.W.3d 833, 837 n.7 (Tex. App.—Dallas 2008, pet. denied).

94. *See id.* at 835.

95. *Id.* at 834–35.

96. *Id.* at 841.

97. *See id.*

98. Hancock v. Chi. Title Ins. Co., 635 F. Supp. 2d 539 (N.D. Tex. 2009).

99. *Id.* at 561.

100. *See id.* at 560–61; *see also* Verizon Emp. Benefits Comm. v. Frawley, 655 F. Supp. 2d 644, 648 (N.D. Tex. 2008).

the right to recover depends on an unjust enrichment theory.[101] A valid contract—one supporting a breach of contract action—can be created by express terms or can be inferred from the words and actions of the parties. The latter is referred to as an "implied-in-fact contract." The implied-in-fact contract depends on the apparent intention of the parties "manifested in language or by implication from other circumstances."[102] In contrast, the quantum meruit cause of action allows recovery only when no valid, express or implied-in-fact agreement exists between the parties; it is what has been called an "implied-in-law contract" or, as it is termed more generally, a quasi-contract.[103]

Proof of a valid contract prevents recovery under a quantum meruit claim.[104] A contract represents the agreed-upon rights and obligations of the parties, and the policies of unjust enrichment do not operate to allow one party to avoid contractual obligations.[105] Nevertheless, plaintiffs often assert a quantum meruit claim as an alternative to a breach of contract claim in order to protect against the possibility that the latter claim might fail.

The elements of a quantum meruit cause of action are:

1. valuable services were rendered or materials furnished [by the plaintiff];
2. for the person sought to be charged;
3. which services and materials were accepted by the person sought to be charged, used and enjoyed by him;
4. under such circumstances as reasonably notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid by the person sought to be charged.[106]

The first two of these elements closely track the first two elements of a general unjust enrichment cause of action. The defendant must have obtained a particular kind of benefit (services or goods) at the expense of the plaintiff. However, in lieu of the more general showing that retention of the benefit without compensation would be unjust, the quantum meruit

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101. *See* Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc., 246 S.W.3d 42, 49–50 (Tex. 2008).

102. Restatement (Second) of Contracts § 4 cmt. a (1981).

103. *See In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 740 (Tex. 2005).

104. *See Frank's Casing*, 246 S.W.3d at 50; *see also* Truly v. Austin, 744 S.W.2d 934, 936 (Tex. 1988).

105. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2 cmt. c (2011) (restitution must be subordinated to contract law when parties have defined their own obligations by agreement).

106. Vortt Exploration Co. v. Chevron U.S.A., Inc., 787 S.W.2d 942, 944 (Tex. 1990). The Texas Supreme Court's statement of the first element merges the general assumpsit counts of quantum meruit (claim for services) and quantum valebat (claims for goods).

claim requires the plaintiff to prove the defendant knew before receiving the benefit that the plaintiff expected compensation.

One might reasonably expect that a defendant who knowingly accepted services with knowledge of the plaintiff's expectation of compensation would be bound by an implied-in-fact contract. Failure to pay under these circumstances would leave the plaintiff with a breach of contract cause of action. For instance, a person who makes an offer to a farmer to clear a ten-acre tract of the farmer's land may fail to agree with the farmer on a price. However, when the farmer agrees to this service, he does so with knowledge that the offeror expected compensation. Such knowledge would seem invariably to transform a quantum meruit claim into an implied-in-fact contract requiring the farmer to pay a reasonable fee.[107]

However, the agreement might fail because of indefiniteness or for some other reason. Under those circumstances, a quantum meruit claim based on unjust enrichment rather than on contract would be appropriate. The amount of recovery would be similar to a suit for an implied-in-fact contract—that is, a reasonable price.[108] Assume instead, as Hypothetical 6, the land-clearing offer was made to farmer *A*, who agreed to have the land cleared, but the land-clearing company mistakenly cleared a ten-acre tract owned by farmer *B*, thinking it was the land of farmer *A*. If we assume no other facts, the land-clearing company cannot recover from farmer *A* or farmer *B* based on contract, and could only seek recovery through quantum meruit against farmer *B*, the party who received the benefit of its services.

Under those circumstances, farmer *B* would contend that the land-clearing company could not recover in quantum meruit because farmer *B* failed to accept the services and, at the time they were provided, was not reasonably notified that the plaintiff expected compensation. Because the benefit was nonreturnable, farmer *B* has no choice but to enjoy these benefits. In short, the Texas requirements for quantum meruit make sense only when limited to the failed contract case.

If, on the other hand, this claim were described as a general unjust enrichment claim, farmer *B* would assert the "volunteer's defense" that denies recovery to those who, without request, voluntarily provide services. That defense would not block the company's claim if it could prove that farmer *B* knew of the work as it was going on and knew of the company's mistake.[109] The company could also counter that defense by seeking

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107. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 cmt. e (2011).

108. *See id.* § 31 cmt. e, illus. 7.

109. Professor Kovacic-Fleischer argues that the key difference between a finding of contract or reliance solely on quantum meruit lies in the existence of a request by the defendant

restitution as a mistaken improver,[110] but courts find it difficult to order compensation from a defendant who did nothing to encourage work that it would not have chosen to buy.[111] In other words, a general unjust enrichment claim would allow, or encounter defenses that prevented, restitution in most of the same cases. The resolution would, however, be reached through a more direct discussion of the essential questions rather than through artificially imposed nomenclature.

Quantum meruit claims have also been applied in cases in which the plaintiff was a subcontractor, having a contract only with a now-insolvent general contractor. Difficult questions arise when the unpaid subcontractor sues the property owner and its quantum meruit claim depends on the existence of facts tending to satisfy the fourth requirement. The owner who has paid the prime contractor and is now sued in quantum meruit by the subcontractor can argue that it is not enriched, much less unjustly so, by receipt of the services provided by the subcontractor.[112]

The last two quantum meruit elements will thus be affected by the same factors that would be considered as limitations on or defenses to a general unjust enrichment claim. In both instances, the court will determine whether retention of a benefit by the defendant was unjustified. If the owner had not paid the general contractor and possesses the benefit added by those services that it requested (though from the general contractor), retention of that benefit seems unjustified. The owner, who expected to pay a certain amount for the services provided, is not unjustly treated by having to transfer that sum to the subcontractor.[113] The last two elements of quantum meruit add little to the proper resolution of this conflict, and analysis would be much improved by adopting a general unjust enrichment claim that is cabined by very similar defenses.[114]

In the Texas Supreme Court decision *Vortt Exploration Co. v. Chevron U.S.A., Inc.*, Vortt provided seismic services and information in order to

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for the services. Candace Saari Kovacic-Fleischer, *Quantum Meruit and the* Restatement (Third) of Restitution and Unjust Enrichment, 27 Rev. Litig. 127, 132 (2007).

110. "A person who improves the real or personal property of another, acting by mistake, has a claim in restitution as necessary to prevent unjust enrichment." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10 (2011). In Texas, the property code provides a statutory remedy for one who, in good faith, possessed the property and made improvements. *See* TEX. PROP. CODE ANN. § 22.021 (2000).

111. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10 cmt. a (2011).

112. *See* Doug Rendleman, *Quantum Meruit for the Subcontractor: Has Restitution Jumped off Dawson's Dock?*, 79 TEX. L. REV. 2055, 2073 (2001).

113. *See id.* at 2074.

114. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2(3) (2011) ("There is no liability in restitution for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant's intervention in the absence of contract.").

encourage Chevron to enter a joint operating agreement with Vortt.[115] Without entering the agreement, but with knowledge of Vortt's motive, Chevron drilled a producing well at the location indicated by Vortt's information.[116] In the subsequent litigation, a trial court entered judgment on Vortt's quantum meruit claim, awarding it $178,750 for information that cost it roughly $18,000.[117] In other words, the majority upheld a trial court award that was approximately ten times the cost of the data, effectively forcing Chevron to disgorge some of the profits earned from the data. Vortt thus gained a much greater award than it was likely to obtain in a contractual arrangement. Had the supreme court used a general unjust enrichment cause of action, it would have been more difficult to order disgorgement except upon proof that Chevron's actions made it a conscious wrongdoer.[118]

This discussion began with a consideration of the factors that distinguish a claim for breach of an implied-in-fact contract (one inferred from the circumstances) from a claim for unjust enrichment (in the absence of a contract). Quantum meruit's third element—proving the defendant "accepted" the services and "used and enjoyed" them—imposes artificial requirements to the extent that they divert attention from the inquiry about whether the defendant was unjustly enriched by not having to pay for the services received. The fourth element explains little to aid in distinguishing a true contract claim and a quantum meruit claim. In most instances, a defendant who has timely notice that the plaintiff is performing services with the expectation of payment will either have requested services or be estopped from denying a contract. The elements of a Texas quantum meruit claim seem to provide recovery only when a contractual claim fails for some reason. Application of the general unjust enrichment cause of action would cause less confusion and allow better decisions.[119]

V. THE TEXAS SUPREME COURT AND UNJUST ENRICHMENT

The modern cause of action establishing civil liability for restitution rests on the fulfillment of three requirements: (1) The defendant must have

115. Vortt Exploration Co. v. Chevron U.S.A., Inc., 787 S.W.2d 942, 944 (Tex. 1990).

116. *Id.*

117. *Id.* at 946 (Hecht, J., dissenting).

118. Even if Chevron had requested the services and goods provided by Vortt, recovery should have been limited to the lesser of a market price or that price the defendant expressed a willingness to pay. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 cmt. e (2011).

119. *See* Heldenfels Bros. v. City of Corpus Christi, 832 S.W.2d 39, 42 (Tex. 1992) (Texas Supreme Court decided against subcontractor's noncontractual claim for payment against the city on the basis of unjust enrichment even though a quantum meruit claim was also made).

gained a benefit (2) at the expense of the plaintiff, (3) and retention of that benefit must be shown to be unjust.[120] An independent unjust enrichment claim of this sort would replace the artificial limitations of special unjust enrichment claims and exist as a freestanding cause of action independent of tort or contract law. Although the evidence suggests that the Texas Supreme Court has accepted such a claim and speaks of it as an unjust enrichment claim, that court has not done so with such clarity as to end controversy on the issue.

The Texas Supreme Court has clearly authorized Texas courts to adjudicate *freestanding* claims—ones not dependent on tort or contract and ones based on the policy of preventing unjust enrichment.[121] As noted above, the supreme court has clearly recognized the special claims of money had and received and quantum meruit—neither one of these claims depends on proof of a right under either tort or contract.

A. Limitations for Unjust Enrichment Claims

The Texas Supreme Court has expressly recognized unjust enrichment claims by treating them separately for limitations purposes. In *Friberg-Cooper Water Supply Corp. v. Elledge*, the Fort Worth Court of Appeals reversed a trial court's application of the two-year statute of limitations to what the plaintiff labeled an unjust enrichment claim.[122] The court of appeals concluded that the plaintiff had actually asserted a money-had-and-received cause of action because "[u]njust enrichment, itself, is not an independent cause of action."[123] That court also noted how money had and received had been expanded beyond its original application to contract cases in the famous case of *Moses v. Macferlan*.[124] This expansion allowed the common law courts to prevent unjust enrichment by providing restitution in cases where contract law did not support recovery.[125]

The Fort Worth Court of Appeals concluded that the plaintiff's money-had-and-received claim was really a claim on a debt not in writing and was therefore subject to the four-year statute of limitations.[126] The Texas Supreme Court reversed, holding that all "extra-contractual actions for

120. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (2011).

121. Although a valid contract prevents use of an unjust enrichment claim, a pleader can use such a claim as an alternative should the contract be deemed invalid.

122. Friberg-Cooper Water Supply Corp. v. Elledge, 197 S.W.3d 826, 833 (Tex. App.—Fort Worth 2006), *rev'd*, 240 S.W.3d 869 (Tex. 2007) (per curiam).

123. *Id.* at 832.

124. *Id.* (citing Moses v. Macferlan, (1760) 97 Eng. Rep. 676 (K.B.)).

125. *See id.*

126. *Id.* at 833.

unjust enrichment" must be brought within the two-year limitations period.[127] The supreme court declared "categorically" that "[u]njust enrichment claims are governed by the two-year statute of limitations."[128] Although it mentioned "unjust enrichment claims" six times in its three-page per curiam opinion, the supreme court did not refer to the claim at issue as one for money had and received. Instead, it referred to the claim as one seeking restitution "under an unjust enrichment theory."[129]

B. Legal and Equitable Restitution

As discussed above, both the common law and equity courts of England developed civil liability for one unjustly enriched. The different remedies available in common law or equity to accomplish restitution distinguished the two forms of claims. In the common law courts, the primary remedy was a monetary award, but the courts of equity primarily designed special forms of its injunctive remedy to prevent unjust enrichment. The equity courts used various names, such as constructive trusts or equitable liens, but the operative mechanism was the injunction—the most significant remedy of equity courts.

The following decisions of the Texas Supreme Court have been chosen because either the court's language or its ruling bears upon the question of whether a general unjust enrichment cause of action exists in Texas law. These decisions have been separated into the two categories: common law or "legal" restitution (cases featuring monetary awards) and equitable restitution (cases featuring one of the remedies developed in the courts of equity). This division adds order to the discussion and shows how the Texas Supreme Court has found liability for equitable restitution without regard to the common law claims for quasi-contract, money had and received, and quantum meruit.

C. Legal Restitution

In *Gavenda v. Strata Energy, Inc.*, the Texas Supreme Court found liability in a case in which the facts supported the three elements of a general unjust enrichment cause of action.[130] In *Gavenda*, royalty owners sued the oil and gas lease operator for underpayment of royalties.[131] The operator had prepared division orders that, in respect to the plaintiffs,

127. Elledge v. Friberg-Cooper Water Supply Corp., 240 S.W.3d 869, 870 (Tex. 2007) (per curiam).

128. *Id.* at 871.

129. *Id.* at 869.

130. Gavenda v. Strata Energy, Inc., 705 S.W.2d 690, 693 (Tex. 1986).

131. *Id.* at 691.

erroneously reduced the percentage of their royalties.[132] Division orders prescribe the procedure for distributing royalty proceeds and designate the recipients and the proportion they are due from the sale of oil and gas. The operator defended based on the Texas rule that division orders bind underpaid royalty owners until revoked.[133] Prior to that revocation, the operator is immune to suit based on errors in the order. Both the trial court and the court of appeals held in favor of the operator on this ground.[134]

The rule protecting unrevoked division orders is typically justified by the need to protect operators and purchasers and to enhance the stability of the oil and gas industry.[135] However, the Texas Supreme Court noted that the rule applied when an operator overpaid some royalty owners and underpaid others, but had itself retained none of the money it should have paid in royalties.[136] Under these circumstances, recovery from the operator by the underpaid royalty owners would impose double liability—the operator would have to pay an additional amount that duplicated what it had already paid the overpaid royalty owners.[137] In addition, an operator who erred in this fashion would not profit from the error and, therefore, could not have been enriched, much less unjustly so.[138] Furthermore, enforcing the division order did not leave the underpaid royalty owners without a remedy because they could sue the overpaid royalty owners.[139] The supreme court described its reasoning by noting that "[t]he basis for recovery is unjust enrichment; the overpaid royalty owner is not entitled to the royalties."[140]

In the *Gavenda* case, the operator prepared erroneous division orders *and* retained money due the underpaid royalty owners. Under these circumstances, the Texas Supreme Court held that division orders were not binding, and the underpaid royalty owners could recover the money retained by the operator because to the extent it profited from its own error "[t]here was unjust enrichment."[141] As noted, the three elements for a general unjust enrichment cause of action consist of (1) the defendant having obtained a benefit (2) at the expense of the plaintiff, (3) and retention of that benefit would constitute unjust enrichment. These three

132. *Id.*
133. *Id.*
134. *Id.* at 690.
135. *See id.* at 692.
136. *See id.*
137. *Id.*
138. *See id.*
139. *Id.*
140. *Id.*
141. *See id.* This reasoning by the supreme court applied the three elements of a general unjust enrichment cause of action.

elements explain how the royalty owners (the plaintiffs) who sued the operator (the defendant) proved that the operator retained their royalties, thereby gaining a benefit at their expense. The operator had no justification for retaining those benefits and was therefore unjustly enriched. When, instead, the operator erred in paying the proper amounts to various royalty owners but retained none of these royalties, it gained no benefit at the expense of the underpaid royalty owners and could not have been unjustly enriched.

In *Heldenfels Brothers v. City of Corpus Christi*,[142] the Texas Supreme Court denied the plaintiff relief under a "theory of unjust enrichment," but cited the *Pope* decision for the proposition that "[a] party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage."[143] Referring to recovery based on a "theory" rather than on a cause of action[144] makes this quote somewhat unclear, but one does not obtain a ruling establishing a defendant's liability without proving a cause of action. A theory that purports to create liability must be a cause of action and not a mere abstraction. The Texas Supreme Court thus assumed in this case, without deciding, that an unjust enrichment cause of action exists, as did the court of appeals.[145]

The Texas Supreme Court also used language that directly supports the existence of a general unjust enrichment cause of action in *HECI Exploration Co. v. Neel*.[146] HECI was the lessee of a tract on which the Neels held oil and gas royalties. Prior to this litigation, HECI had sued AOP, the lessee of an adjoining tract, claiming that AOP was overproducing their common reservoir. HECI was the sole plaintiff and recovered a judgment against AOP, which HECI and AOP settled.[147] Four years later, the Neels sued HECI to recover that portion of HECI's judgment that they claimed represented damages to their royalty interests. The trial court entered summary judgment in favor of HECI, ruling against all of the Neels' claims, including one for unjust enrichment.[148]

142. Heldenfels Bros. v. City of Corpus Christi, 832 S.W.2d 39 (Tex. 1992).

143. *Id.* at 41 (citing Pope v. Garrett, 211 S.W.2d 559, 560, 562 (Tex. 1948)).

144. A plaintiff must plead and prove some legal basis, which we generally call a cause of action, before a court has authority to impose a judicial remedy at the expense of the defendant. Although the court here referred to those grounds as a theory, it was nevertheless discussing the substantive basis for a judicial remedy. *See id.*

145. *See* City of Corpus Christi v. Heldenfels Bros., 802 S.W.2d 35, 40 (Tex. App.—Corpus Christi 1990), *aff'd*, 832 S.W.2d 39 (Tex. 1992).

146. HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998).

147. *Id.* at 884.

148. *Id.*

The supreme court upheld summary judgment in respect to the unjust enrichment cause based on its conclusion that HECI had no legal right to recover from AOP for any of the interests held by the Neels.[149] Therefore, no part of the settlement received by HECI from AOP could represent payment for the harm AOP's actions caused the Neels' interests. The Neels may well have had an unjust enrichment cause of action against AOP, but they failed to assert that claim within the limitations period.

In conclusion, the Texas Supreme Court held that the Neels could not sue HECI for unjust enrichment because HECI could not have been enriched at the Neels' expense in the settlement with AOP.[150] In this discussion, the supreme court made the following statement: "We have recognized that, in some circumstances, a royalty owner has a cause of action against its lessee based on unjust enrichment, but only when the lessee profited *at the royalty owner's expense*."[151] On a related point, the supreme court in *HECI* cited its earlier decision in *Gavenda v. Strata Energy, Inc.*[152] for the proposition that a lessee's erroneous division order was not binding on a royalty owner when that order had caused the lessee to retain funds due that royalty owner.[153] If, on the other hand, the lessee's error merely overpays some and underpays other royalty owners, the underpaid royalty owners possess an unjust enrichment claim against the overpaid royalty owners but not against the lessee.[154] Unlike the lessee in *Gavenda*, HECI had not retained or obtained any money that was legally due the Neels, and therefore, HECI could not have been unjustly enriched at the Neels' expense.[155] In *HECI*, as noted above, the supreme court explicitly referred to an unjust enrichment "cause of action" rather than to an unjust enrichment theory.[156]

In *Fortune Production Co. v. Conoco, Inc.*,[157] the Texas Supreme Court upheld a judgment in favor of one of the plaintiffs (Cox) solely on the basis of an unjust enrichment cause of action.[158] In distinguishing the rights of the other plaintiffs, the supreme court stated that "[a] cause of action for

149. *Id.* at 891–92.

150. *See id.*

151. *Id.* at 891.

152. Gavenda v. Strata Energy, Inc., 705 S.W.2d 690 (Tex. 1986).

153. *HECI*, 982 S.W.2d at 891 (citing *Gavenda*, 705 S.W.2d at 692–93).

154. *See id.*

155. *Id.* ("The fact that HECI may have recovered more than it was entitled is a matter about which AOP could have complained in the suit against it, but that does not give rise to a *cause of action for unjust enrichment* in favor of the Neels." (emphasis added)).

156. *See id.* ("We have recognized that, in some circumstances, a royalty owner has a *cause of action against its lessee based on unjust enrichment*, but only when the lessee profited *at the royalty owner's expense*." (first emphasis added)).

157. Fortune Prod. Co. v. Conoco, Inc., 52 S.W.3d 671 (Tex. 2000).

158. *Id.* at 685.

unjust enrichment is not available to recover payments in addition to the contract price the parties agreed upon."[159] However, the court upheld the judgment in favor of Cox based on an unjust enrichment cause of action in part because he was not a party to a contract during the relevant period.[160]

In *Fortune*, four natural gas producers (Fortune, Tucker, Hankamer, and Cox) had written agreements to sell natural gas to Conoco's predecessor in interest, Farmland.[161] After purchasing the interests and receiving an assignment of these contracts, Conoco had terminated the existing contracts and entered new ones in 1990 with three of the four producers. Cox had refused to enter a contract, but continued selling natural gas to Conoco. In 1992, Hankamer refused to renew its contract but continued selling natural gas to Conoco as well.[162] These four producers sued Conoco alleging fraud in the inducement to sign the contracts in 1990, contending Conoco misrepresented its ability to sell the gas according to a long-term contract, and claiming unjust enrichment because Conoco had been selling the field liquids (condensate) it collected by compressing the natural gas flow without sufficient payment to the producers.[163]

To the extent the plaintiffs had valid contracts that dealt with the subject matter of this unjust enrichment claim, the contracts precluded their right to recover based on unjust enrichment.[164] However, Cox had refused to enter a contract with Conoco during the period in question, and the Texas Supreme Court expressly upheld Cox's unjust enrichment judgment.[165] The unjust enrichment judgment awarded to Hankamer, who had stopped entering into contracts after Cox, was remanded because the jury had not distinguished between the time Hankamer was operating under an express contract and the period during which Hankamer was not.[166]

The Texas Supreme Court in *Fortune* never described Cox's claim as one in quantum meruit (the arguably applicable special unjust enrichment claim). Instead, it sustained a judgment based on unjust enrichment that did not depend on Conoco's tortious conduct. The supreme court also stated that the plaintiffs "elected to pursue a claim for unjust enrichment rather than breach of contract."[167] This statement supports the conclusion that the

159. *Id.* As noted above, unjust enrichment cannot stand as a cause of action to alter valid and enforceable provisions of a contract.

160. *See id.*

161. *Id.* at 673–74.

162. *Id.* at 674–75.

163. *Id.* at 675.

164. *Id.* at 685.

165. *Id.*

166. *Id.*

167. *Id.* at 683.

court accepted a general claim for unjust enrichment as independent of contract claims as well.

D. Equitable Restitution

It is clear that Texas courts award both the common law and equitable remedies of restitution. That is only proper, but using what are historically common law sources to support remedies that were not seen in the common law courts seems inappropriate and confusing. Of course, the Texas Supreme Court could expand quasi-contract to support equitable remedies. Unfortunately, this would continue the use of confusing terminology and would distort legal history as well.

1. Constructive Trust

In its 1948 decision in *Pope v. Garrett*, the Texas Supreme Court upheld a judgment awarding a constructive trust against all of the heirs of an intestate and covering all of the assets of her estate.[168] In *Pope*, the defendants had received property through the descent and distribution statute from the estate of Ms. Carrie Simons. Although Ms. Simons died without leaving a will, she had clearly intended to execute a will giving all of her estate to the plaintiff, Ms. Garrett. When she sought to sign her will, two of her heirs caused such a disturbance that she was prevented from executing the will. She fell seriously ill shortly thereafter and died. Some of the defendants who as heirs took property from Ms. Simons' estate had not participated in this disturbance and were innocent of any wrongdoing.[169] Nevertheless, all of the heirs had received property from the estate as a result of the wrongful action of the two heirs. Because Ms. Simons had clearly intended to transfer all of her estate to Ms. Garrett by will, the heirs were all enriched at Ms. Garrett's expense.[170] The trial court impressed a constructive trust on all of the assets of the estate, including those assets held by the heirs innocent of any wrongdoing, but the court of appeals reversed insofar as the constructive trust affected the property in the hands of the innocent heirs.[171]

However, all of the defendants had benefited at the expense of Ms. Garrett, and the Texas Supreme Court held that retention of these benefits, even by the innocent heirs, would amount to unjust enrichment.[172] In this

168. Pope v. Garrett, 211 S.W.2d 559, 562 (Tex. 1948).
169. *Id.* at 559–60.
170. *See id.*
171. *Id.* at 559.
172. *Id.* at 562.

fashion, the Texas Supreme Court's decision was based on the satisfaction of the three basic elements of a general unjust enrichment cause of action. Restitution through the constructive trust effectively transferred the estate's assets to the plaintiff because "[t]he policy against unjust enrichment argues in favor of the judgment rendered herein."[173] The trial court impressed the constructive trust because "[b]ut for the wrongful acts [of two of the defendants] the innocent defendants would not have inherited interests in the property."[174]

The supreme court recognized that some courts denied such a plaintiff any relief in tort against the innocent heirs because the plaintiff had no existing right to the property but merely an expectancy interest.[175] Without deciding the existence of this tort cause of action in Texas, the supreme court approved the trial court's power as a court of equity to compel the transfer of the estate to the intended legatee.[176] The supreme court concluded that, though not guilty of tortious wrongdoing, the innocent defendants had obtained a benefit at the expense of the plaintiff and that the "policy against unjust enrichment" required the return of that benefit to the plaintiff.[177]

More recently, the Texas Supreme Court stated in *Meadows v. Bierschwale* that violation of a fiduciary relationship is not necessary to support imposition of a constructive trust.[178] Although the supreme court noted that proof of actual fraud can justify a constructive trust, it cited with approval the first Restatement of Restitution, which explains that a constructive trust arises to remedy unjust enrichment and does not require breach of a fiduciary relation.[179]

In *Meadows*, Oakes used fraud to induce Bierschwale to convey an apartment complex in exchange for a series of notes that turned out to be worthless. Before Bierschwale sued him, Oakes had sold the property at a profit to a second buyer in exchange for promissory notes that were not worthless. Bierschwale recovered a judgment against Oakes and obtained a constructive trust on the promissory notes that Oakes received from the second buyer.[180]

In the case before the Texas Supreme Court, Bierschwale's real estate agent, Meadows, sought a share of the constructive trust imposed on those

173. *Id.*
174. *See id.*
175. *Id.* at 561.
176. *See id.*
177. *Id.* at 562.
178. Meadows v. Bierschwale, 516 S.W.2d 125, 128 (Tex. 1974).
179. *Id.* (citing Restatement of Restitution § 160 cmt. a (1937)).
180. *Id.* at 127–28.

promissory notes.[181] Bierschwale had agreed to pay Meadows, his agent, a percentage of the sales price, but that sale initially yielded a set of worthless notes.[182] Bierschwale enjoyed a constructive trust on the second set of promissory notes that did have value, but he wanted sole possession of the proceeds from those notes.[183] If able to monopolize the constructive trust, he would likely recover his sales price, including the portion he owed Meadows as a commission. Although Meadows would presumably have had the right to recover a judgment against Bierschwale, his recovery would have been subject to the uncertainty and burden of enforcement. Giving Bierschwale, but not Meadows, the property through a constructive trust would thereby have tended to unjustly benefit the former at the expense of the latter.

Unjust enrichment, rather than fraud or other wrongdoing, supported the Texas Supreme Court's decision to give Meadows a share of the constructive trust. The court made this clear in stating that "[c]onstructive trusts, being remedial in character, have the very broad function of redressing wrong *or* unjust enrichment."[184] The court went further to say that "there is no unyielding formula to which a court of equity is bound in decreeing a constructive trust, since the equity of the transaction will shape the measure of relief granted."[185]

2. *Subrogation*

Subrogation refers to the law's permission for a plaintiff to assert the rights originally belonging to a third party. Parties can agree to subrogation in contracts, typically those involving insurance companies, and contract law controls the application of this "conventional" subrogation. Equitable subrogation applies to prevent unjust enrichment when no contract covers the subject matter of the conflict.

Equitable subrogation can have two effects: it can substitute the plaintiff for one who originally held the right to establish the defendant's liability, or it can create in the plaintiff a security interest against specific property of the defendant.[186] The Restatement (Third) characterizes these two effects of equitable subrogation as substantive and remedial.[187]

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181. *Id.* at 131.
182. *Id.* at 127–28.
183. *See id.* at 131.
184. *Id.* (emphasis added).
185. *Id.*
186. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 57 cmt. a (2011) ("The word 'subrogation'—an antique synonym for 'substitution'—is commonly used to describe both a liability and a remedy in restitution.").
187. *See id.*

The remedial effect of subrogation typically appears in cases in which the defendant obtains money that rightfully belongs to the plaintiff, but uses that money to pay off a secured debt on specific property. For example, assume the defendant embezzled the plaintiff's money and used that money to pay off the mortgage lien on her home and to obtain a release. If tracing evidence supports this description of the facts, a judicial order can reinstate the lien to cover the amount paid with the plaintiff's money and name the plaintiff as the lienholder. This remedial form of equitable subrogation provides the plaintiff restitution only after he satisfies the requirements of liability—by proving unjust enrichment—and traces the benefit taken by the defendant to the release of the lien.

If the plaintiff could only prove a claim for unjust enrichment but could not trace his money to the removal of the lien, he could nevertheless obtain restitution in the form of a monetary judgment. A monetary judgment gives him no priority over other creditors who may be competing for the assets of the defendant. If the plaintiff can prove the unjust enrichment claim *and* satisfy the requirement for tracing, equitable subrogation allows him to enjoy the priority of a lien for the same amount of money and thus gives him priority over unsecured creditors.[188]

Equitable subrogation's substantive effect gives the plaintiff standing to assert a right of action the law originally lodged with a third party. This effect resembles a contractual assignment of a right of action, but allows substitution in the absence of a contract. The law creates this extra-contractual substitution of the plaintiff for the third party in order to prevent the defendant's unjust enrichment.

For example, in *Frymire Engineering Co. v. Jomar International, Ltd.*, the Texas Supreme Court used equitable subrogation to establish the plaintiff's standing to assert the rights of the entity whose property was damaged.[189] In *Frymire*, the Renaissance Hotel in Dallas had employed a general contractor to remodel one of its meeting rooms. Frymire contracted with the general contractor to do part of that work. In its contract with the general contractor, Frymire agreed to pay for any damages that its work caused the hotel or the general contractor and to cover this obligation with liability insurance. In completing its work on the hotel's air conditioning system, Frymire installed a valve manufactured by Jomar. A leak in the air conditioning water line at the location of the valve caused extensive damage

188. *See id.* This remedial form of equitable subrogation is "closely analogous to the operation of constructive trust (§ 55) or equitable lien (§ 56), but . . . [i]nstead of an acquisition of property . . . at the claimant's expense, . . . the claimant's assets have been used to satisfy an obligation of the defendant." *Id.*

189. Frymire Eng'g Co. v. Jomar Int'l, Ltd., 259 S.W.3d 140 (Tex. 2008).

to the hotel.[190] Upon demand by the hotel, Frymire's insurer, Liberty Mutual, paid the hotel $458,496 on Frymire's behalf. In exchange for this payment, the hotel released Frymire and Liberty Mutual from all claims arising from this damage.[191]

Frymire and Liberty Mutual then sued Jomar alleging its valve was defective. However, the trial court granted summary judgment in favor of Jomar, and the court of appeals affirmed this judgment based on its conclusion that the plaintiffs lacked standing to assert what the court deemed were rights belonging to the hotel.[192] The court of appeals held that Frymire failed to satisfy the requirements of equitable subrogation and thus could not obtain standing by substituting for the hotel.[193]

The Texas Supreme Court reversed the court of appeals, holding that equitable subrogation applied to give Frymire standing to assert the hotel's claims against Jomar.[194] In reaching this conclusion, the supreme court stated that Frymire should have a trial because the evidence supported its "contentions that it (1) paid a debt primarily owed by Jomar, (2) did so involuntarily, and (3) seeks subrogation in a situation where Jomar would be unjustly enriched if Frymire were precluded from pursuing its claims."[195]

Here, the immediate remedy sought was equitable subrogation, and the supreme court granted that remedy to prevent the unjust enrichment of Jomar at the expense of Frymire. The supreme court gave Frymire standing because it had paid off a claim that was primarily the obligation of Jomar.[196] If Jomar had been allowed to avoid Frymire's claim for money paid to the hotel (allegedly to cover damages caused by Jomar's defective product), Jomar would have been unjustly enriched. These characteristics track the three elements of a general unjust enrichment claim with the addition of a requirement that Frymire must not have voluntarily made the payment.

The Texas Supreme Court stated in its earlier decision in *Smart v. Tower Land & Investment Co.*, that:

> Equitable subrogation may be invoked . . . when one person confers upon another a benefit that is not required by legal duty or contract [such as when one person pays the debt of another]. . . . Subrogation . . . is available, however, only when the

190. *Id.* at 142.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 147.
195. *Id.*
196. *Id.*

> debtor was enriched unjustly; thus, the payor who confers a benefit as a "mere volunteer" is not entitled to this remedy.[197]

In general, restitution will not lie "for an unrequested benefit voluntarily conferred."[198] The subrogation requirement that the plaintiff acted involuntarily merely expresses a fundamental limiting principle on unjust enrichment claims.[199] Frymire's contract with the general contractor obligated it to pay any damages its work caused the hotel, and though entry into this contract may have been voluntary, Frymire's "duty to honor that contract was not."[200] Furthermore, given "the evidentiary presumption that Jomar's faulty product primarily caused the water damage, [the court had] no trouble concluding that Jomar would be unjustly enriched were Frymire not permitted to pursue its claims."[201]

3. *Rescission and Reformation*

The Texas Supreme Court has also recognized the equitable nature of the remedy of rescission.[202] Rescission allows a court to set aside a contract because of mutual mistake or wrongdoing, and restitution comes into play when it would be unjust to allow one party to retain any benefit gained before rescission.[203] In addition to rescission, courts can reform a document that was mistakenly drafted. For example, in a 1916 decision, the Texas Supreme Court reformed a document that erroneously stated that a debtor had fully paid the note held by his bank.[204] If enforced, such mistakes can unjustifiably enrich a party to the agreement or a third party, and reformation operates to prevent that unjust enrichment.

In *Myrad Properties, Inc. v. LaSalle Bank National Ass'n*, Myrad had obtained financing from LaSalle's predecessor in interest for two separate properties in the total amount of $1.05 million.[205] An apartment complex was located on each of the two properties, and the deed of trust covered both tracts with improvements. Myrad defaulted on the loan, and LaSalle

197. Smart v. Tower Land & Inv. Co., 597 S.W.2d 333, 337 (Tex. 1980).

198. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2(3) (2011); *see also id.* § 2 cmt. d ("Instead of proposing a bargain, the restitution claimant first confers a benefit, then seeks payment for its value.").

199. *See id.* § 2(3) ("There is no liability in restitution for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant's intervention in the absence of contract.").

200. *Frymire*, 259 S.W.3d at 146.

201. *Id.*

202. *See* Smith v. Nat'l Resort Cmtys., Inc., 585 S.W.2d 655, 660 (Tex. 1979).

203. *See id.*; 1 DOBBS, *supra* note 7, § 4.3(6), at 614–15.

204. *See* First State Bank of Amarillo v. Jones, 183 S.W. 874, 876–77 (Tex. 1916).

205. Myrad Props., Inc. v. LaSalle Bank Nat'l Ass'n, 300 S.W.3d 746, 748 (Tex. 2009).

proceeded with foreclosure. Through oversight, the notice of foreclosure referred to an Exhibit A, which described only one of the properties.[206]

At the foreclosure sale, the trustees referred generally to the properties described in the deed of trust, and LaSalle made the sole bid at auction of $978,000.00 for the two properties.[207] However, the trustees' deed conveyed to LaSalle only that property described in the Exhibit A that was attached to the notice of foreclosure.[208] After the parties discovered this mistake, the trustees substituted a corrected deed transferring both properties for the erroneous deed that transferred only one. Myrad sued to restrain LaSalle from filing the corrected deed, but the district court ultimately allowed the correction. The court of appeals affirmed the judgment holding that the corrected deed validly gave LaSalle title to both properties.[209]

The Texas Supreme Court held, however, that the correction deed was void as a matter of law because this device could be used only for correcting some facial imperfection in the title.[210] In this case, the correction deed included an additional, separate parcel of land.[211] Nevertheless, the supreme court held that "[r]escission is an available equitable remedy if mutual mistake is shown."[212] It also noted that Myrad's position—that the erroneous deed must stand as the sole transfer—would result in Myrad's unjust enrichment.[213] That position would result either in requiring LaSalle (or some other buyer) to pay another sum for the second property, giving Myrad a windfall from the surplus, or leaving Myrad the owner of the second parcel even though it had defaulted on its note.[214] The supreme court therefore concluded that "Myrad [would] be unjustly enriched if the mistaken deed to LaSalle is enforced."[215] Since this was the case, the court

206. *Id.*
207. *Id.*
208. *Id.* at 748–49.
209. *Id.* at 749.
210. *Id.* at 750–51.
211. *Id.*
212. *Id.* at 751.
213. *Id.* at 752–53.
214. *See id.* at 752. The Texas Supreme Court's reasoning in *Myrad* followed the rule stated in § 12 of the Restatement (Third). Section 12 does not specify the remedy that should be used to avoid unjust enrichment, but the typical remedy would be reformation. In *Myrad*, the Texas Supreme Court spoke of rescission, assuming that once the erroneous deed was removed from effect the trustees would substitute one that followed the agreement of the parties. In both instances, restitution prevents or reverses some party's unjust enrichment but does so by giving "effect to the real agreement of the parties." *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 12 cmt. b (2011).
215. *Myrad*, 300 S.W.3d at 753.

stated that "[t]o avoid an unjust enrichment, we rule in favor of LaSalle and render judgment on its claim for rescission."[216]

VI. CONCLUSION

The Texas Supreme Court rulings on restitution describe a generally applicable cause of action that the court most frequently identifies as one aimed at preventing unjust enrichment. This cause of action supports both the equitable and common law remedies in restitution. The quasi-contract cause of action identified by some lower Texas courts cannot, without stumbling over its own history, authorize equitable restitution. The Texas Supreme Court rulings also tend to label as unjust enrichment a general cause of action that is independent of tort or contract claims. Although the evidence is as yet unclear, the supreme court also seems to be moving away from an insistence on the use of the special unjust enrichment claims of money had and received and quantum meruit.

These actions by the Texas Supreme Court have created a foundation for clarification of its unjust enrichment cause of action. That clarification should begin with an authoritative statement describing the elements of the cause of action and the breadth of its application. The court acted emphatically in its forceful statements in *Elledge* when it insisted on the application of the two-year statute of limitations to unjust enrichment claims. That same emphatic action may be necessary to clear away the controversy in this area.

Those steps by the Texas Supreme Court will necessarily diminish the significance of the confusing terms born in the late Middle Ages to cloak the creation of a substantive right against unjust enrichment. Texas courts do not need the linguistic cover provided by quasi-contract terminology, and the law is better served by allowing judges and litigants to confront the problem of unjust enrichment directly. Speaking of liability in terms of unjust enrichment directs the reader to one of the core concepts of the law of restitution. Making such concepts more understandable will not solve every difficulty. Hard cases will still occur, but they will be difficult because of their merits, not because we do not understand our own terms. Using language that refers only to obsolete procedural forms, or to fictional justifications for expanding the jurisdiction of ancient courts, makes even

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216. *Id.* In *First State Bank of Amarillo v. Jones*, the Texas Supreme Court reformed a release of lien in which the bank erroneously recited the full payment of the note it held and cancelled its lien on a 103-acre tract. The bank intended, on the basis of a partial payment, to release its lien only as it was binding on other, smaller tracts. The supreme court concluded that "equity would reform the release so as to correct the mistake and speak the truth." *See* First State Bank of Amarillo v. Jones, 183 S.W. 874, 875–77 (Tex. 1916).

easy cases harder and has no legitimate purpose. It is merely habit, and it is a bad one.

APPENDIX: THE UNJUST ENRICHMENT CAUSE OF ACTION BY STATE*

This appendix includes relatively recent statements by the courts of forty-nine states and the District of Columbia that describe the elements of that jurisdiction's cause of action for unjust enrichment. No statement is included for the state of Texas because the unsettled law of that state is the subject of the foregoing Article.

The United States District Court for the Eastern District of Pennsylvania has also published a survey of the states on this subject, and it included the District of Columbia but excluded California. That survey was reported in *Powers v. Lycoming Engines*.[1] The initial decision of the district court in that case—to certify a plaintiff class—was reversed by the Third Circuit, but the reversal did not significantly alter the district court's survey information.[2] The district court discovered that the states surveyed fell into four categories. The first category includes states that require satisfaction of the unadorned elements suggested in § 1 of the Restatement (Third) of Restitution and Unjust Enrichment (Restatement (Third)): "A person who is unjustly enriched at the expense of another is subject to liability in restitution."[3] As noted in the Article, this sentence supports the following elements of a general cause of action where: "(1) a benefit is conferred upon the defendant; (2) at the plaintiff's expense; (3) under circumstances that would make defendant's retention unjust."[4] The second category identified in the *Powers* case includes those states that use five elements: "(1) an enrichment; (2) an economic detriment or loss; (3) a connection between the enrichment and the impoverishment; (4) the absence of justification for the enrichment and the impoverishment; and (5) the absence of a legal remedy."[5] The third category of states identified in *Powers*, and the largest group in the district court's survey, includes an additional element—that the defendant has "appreciated the benefit" and

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* Ms. Aurial Wood performed the research for this appendix. She provided a thorough and extensive body of material from which I created this document. I am grateful for her excellent work and wish to state that any errors in the use of her research are my own.

1. Powers v. Lycoming Engines, 245 F.R.D. 226, 230–33 (E.D. Pa. 2007).
2. *See* Powers v. Lycoming Engines, 328 F. App'x 121, 122–23 (3d Cir. 2009).
3. Restatement (Third) of Restitution and Unjust Enrichment § 1 (2011).
4. *See Powers*, 245 F.R.D at 230–31.
5. *See id.* at 231.

"had knowledge or awareness that it was, in fact, receiving a benefit."[6] The district court included Texas in this category.[7] The reporter for the Restatement (Third) expressed concern that such elements caused unnecessary confusion and might lead to incorrect results.[8] In the district court's fourth category are those states that describe the unjust enrichment claim more generally and do not delineate its elements.[9] These states tend to follow concepts that are similar to the first category of states.

Eleven states included in this appendix and the District of Columbia have clearly adopted the unadorned three elements stated above for a general unjust enrichment cause of action.[10] Several other states could well be included in this group, but their opinions lack the explicit adoption of the three elements. The district court in *Powers* placed such states in its fourth category.[11] Georgia and Illinois could have been omitted from this appendix's list of twelve for similar reasons. However, Georgia was included because the Second Circuit has equated its unjust enrichment claim with that of New York. Illinois was included because the Illinois Supreme Court has expressly described these three requirements for stating an unjust enrichment cause of action and only failed to number them.

1. ALABAMA

"To prevail on a claim of unjust enrichment, the plaintiff must show that the 'defendant holds money which, in equity and good conscience, belongs to the plaintiff or holds money which was improperly paid to defendant because of mistake or fraud.'"[12]

2. ALASKA

> A party seeking to recover for unjust enrichment must show (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable for him to retain it without paying the value thereof.[13]

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6. *Id.*
7. *Id.* at 231 n.14.
8. *See* Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. d (2011).
9. *Powers*, 245 F.R.D at 231.
10. Colorado, Connecticut, Georgia, Illinois, Iowa, Kansas, Michigan, New Mexico, New York, Pennsylvania, and Washington.
11. *Id.* at 231 n.16.
12. *See* Avis Rent a Car Sys., Inc. v. Heilman, 876 So. 2d 1111, 1123 (Ala. 2003) (emphasis omitted) (quoting Dickinson v. Cosmos Broad. Co., 782 So. 2d 260, 266 (Ala. 2000)).
13. Ware v. Ware, 161 P.3d 1188, 1197 (Alaska 2007).

3. ARIZONA

Arizona enforces a claim of unjust enrichment when five elements are satisfied: "(1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law."[14]

4. ARKANSAS

"In short, an action based on unjust enrichment is maintainable where a person has received money or its equivalent under such circumstances that, in equity and good conscience, he or she ought not to retain."[15]

5. CALIFORNIA

"Under the law of restitution, an individual may be required to make restitution if he is unjustly enriched at the expense of another."[16]

6. COLORADO

> The test for recovery under an unjust enrichment theory requires a showing that (1) at plaintiff's expense (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying. The scope of the remedy is broad, cutting across both contract and tort law, with its application guided by the underlying principle of avoiding the unjust enrichment of one party at the expense of another.[17]

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14. Freeman v. Sorchych, 245 P.3d 927, 936 (Ariz. Ct. App. 2011).

15. Campbell v. Asbury Auto., Inc., 381 S.W.3d 21, 36 (Ark. 2011).

16. Ghirardo v. Antonioli, 924 P.2d 996, 1003 (Cal. 1996). *Cf.* McBride v. Boughton, 20 Cal. Rptr. 3d 115, 122 (Cal. Dist. Ct. App. 2004) ("The fact that one person benefits another is not, by itself, sufficient to require restitution." (quoting First Nationwide Savings v. Perry, 15 Cal. Rptr. 2d 173, 176 (Cal. Dist. Ct. App. 1992))); Davenport v. Litton Loan Servicing, LP, 725 F. Supp. 2d 862, 885–86 (N.D. Cal. 2010) (explaining the narrow view of unjust enrichment and particular instances where it supports restitution). *But see* Munoz v. MacMillan, 124 Cal. Rptr. 3d 664, 675 (Cal. Dist. Ct. App. 2011) ("no freestanding cause of action for" unjust enrichment); Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 815 (N.D. Cal. 2011) (restitution can remedy other causes of action, but "unjust enrichment is not an independent cause of action under California law").

17. Robinson v. Colo. State Lottery Div., 179 P.3d 998, 1007 (Colo. 2008) (citation omitted); *see also* Lewis v. Lewis, 189 P.3d 1134, 1141 (Colo. 2008) (upholding the rule in *Robinson*).

7. CONNECTICUT

"Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment."[18]

8. DELAWARE

"The elements of unjust enrichment are: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law."[19]

9. DISTRICT OF COLUMBIA

"Unjust enrichment occurs when: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant retains the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust."[20]

10. FLORIDA

"The elements of an unjust enrichment claim are 'a benefit conferred upon a defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.'"[21]

11. GEORGIA

"Unjust enrichment applies when as a matter of fact there is no legal contract, but when the party sought to be charged has been conferred a

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18. Town of New Hartford v. Conn. Res. Recovery Auth., 970 A.2d 592, 609 (Conn. 2009) (quoting Hartford Whalers Hockey Club v. Uniroyal Goodrich Tire Co., 649 A.2d 518, 522 (Conn. 1994)).

19. Nemec v. Shrader, 991 A.2d 1120, 1130 (Del. 2010).

20. Peart v. D.C. Hous. Auth., 972 A.2d 810, 813 (D.C. 2009) (quoting News World Commc'ns, Inc., v. Thompsen, 878 A.2d 1218, 1222 (D.C. 2005)).

21. Fla. Power Corp. v. City of Winter Park, 887 So. 2d 1237, 1241 n.4 (Fla. 2004) (quoting Ruck Bros. Brick, Inc. v. Kellogg & Kimsey, Inc., 668 So. 2d 205, 207 (Fla. Dist. Ct. App. 1995)).

benefit by the party contending an unjust enrichment which the benefitted party equitably ought to return or compensate for."[22]

12. HAWAII

> It is a truism that "[a] person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, . . . or in any way adds to the other's security or advantage." One who receives a benefit is of course enriched, and he would be unjustly enriched if its retention would be unjust. And it is axiomatic that "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other."[23]

13. IDAHO

"The elements of unjust enrichment are that (1) a benefit is conferred on the defendant by the plaintiff; (2) the defendant appreciates the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit."[24]

14. ILLINOIS

"To state a cause of action based on a theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience."[25]

15. INDIANA

"To prevail on a claim of unjust enrichment, a claimant must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment

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22. Tuvim v. United Jewish Cmtys. Inc., 680 S.E.2d 827, 829–30 (Ga. 2009) (quoting Engram v. Engram, 463 S.E.2d 12, 15 (Ga. 1995)); *see also* Bigio v. Coca-Cola Co., 675 F.3d 163, 176–77 (2d Cir. 2012) (New York and Georgia law both require for a claim for unjust enrichment that the plaintiff show the defendant obtained a benefit at his expense and that equity and good conscience require defendant to return it to the plaintiff).

23. Small v. Badenhop, 701 P.2d 647, 654 (Haw. 1985) (quoting Restatement of Restitution § 1 & cmts. a, b (1937)); Durette v. Aloha Plastic Recycling, Inc., 100 P.3d 60, 72–73 (Haw. 2004).

24. Teton Peaks Inv. Co. v. Ohme, 195 P.3d 1207, 1211 (Idaho 2008).

25. HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc., 545 N.E.2d 672, 679 (Ill. 1989).

would be unjust."[26] A claim in quantum meruit appears to be one application of the claim for unjust enrichment.[27]

16. IOWA

> Recovery based on unjust enrichment can be distilled into three basic elements of recovery. They are: (1) defendant was enriched by the receipt of a benefit; (2) the enrichment was at the expense of the plaintiff; and (3) it is unjust to allow the defendant to retain the benefit under the circumstances.[28]

17. KANSAS

"[W]e [have] explained that unjust enrichment arises when (1) a benefit has been conferred upon the defendant, (2) the defendant retains the benefit, and (3) under the circumstances, the defendant's retention of the benefit is unjust."[29]

18. KENTUCKY

"For a party to prevail under the theory of unjust enrichment, she must prove three elements: '(1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value.'"[30]

19. LOUISIANA

A cause of action for "enrichment without cause" was adopted by the 1995 Louisiana Legislature as LA. CIV. CODE art. 2298, and provides as follows:

> A person who has been enriched without cause at the expense of another person is bound to compensate that person. The term "without cause" is used in this context to exclude cases in which the enrichment results from a valid juridical act or the law. The remedy declared here is subsidiary and shall not be available if the law

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26. Zoeller v. E. Chi. Second Century, Inc., 904 N.E.2d 213, 220 (Ind. 2009).

27. *See* Woodruff v. Ind. Family & Soc. Servs. Admin., 964 N.E.2d 784, 791 (Ind. 2012).

28. State *ex rel.* Palmer v. Unisys Corp., 637 N.W.2d 142, 154–55 (Iowa 2001) (footnote omitted).

29. Estate of Draper v. Bank of Am., 205 P.3d 698, 706 (Kan. 2009).

30. Guerin v. Fulkerson, 354 S.W.3d 161, 165 (Ky. Ct. App. 2011) (quoting Jones v. Sparks, 297 S.W.3d 73, 78 (Ky. Ct. App. 2009)).

provides another remedy for the impoverishment or declares a contrary rule.

The amount of compensation due is measured by the extent to which one has been enriched or the other has been impoverished, whichever is less.

The extent of the enrichment or impoverishment is measured as of the time the suit is brought or, according to the circumstances, as of the time the judgment is rendered.[31]

Prior to the enactment of the above article, which codified the existing law, this court established five requirements for proving unjust enrichment, as follows: "(1) there must be an enrichment; (2) there must be an impoverishment; (3) there must be a connection between the enrichment and the resulting impoverishment; (4) there must be an absence of 'justification' or 'cause' for the enrichment and impoverishment; and (5) there must be no other remedy at law available to plaintiff."[32]

20. MAINE

We have consistently held that a claim for unjust enrichment is established with proof that (1) the claimant "conferred a benefit on" the receiving party, (2) the receiving party "had appreciation or knowledge of the benefit," and (3) "acceptance or retention of the benefit was under circumstances that make it inequitable for [the receiving party] to retain the benefit without payment of its value."[33]

21. MARYLAND

Unjust enrichment consists of three elements: 1. A benefit conferred upon the defendant by the plaintiff; 2. An appreciation or knowledge by the defendant of the benefit; and 3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.[34]

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31. Indus. Cos. v. Durbin, 837 So.2d 1207, 1213 (La. 2003).

32. *Id.* at 1213–14 (quoting Carriere v. Bank of La., 702 So. 2d 648, 651 (La. 1996)).

33. Estate of Anderson, 988 A.2d 977, 980 (Me. 2010) (quoting Estate of Miller, 960 A.2d 1140, 1147 (Me. 2008)).

34. Hill v. Cross Country Settlements, LLC, 936 A.2d 343, 351 (Md. 2007).

22. MASSACHUSETTS

"Restitution is an equitable remedy by which a person who has been unjustly enriched at the expense of another is required to repay the injured party."[35] "An equitable remedy for unjust enrichment is not available to a party with an adequate remedy at law."[36]

23. MICHIGAN

"Even though no contract may exist between two parties, under the equitable doctrine of unjust enrichment, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.'"[37] "In order to sustain the claim of unjust enrichment, plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant."[38]

24. MINNESOTA

"To establish an unjust enrichment claim, the claimant must show that the defendant has knowingly received or obtained something of value for which the defendant 'in equity and good conscience' should pay."[39] "A party may not have equitable relief where there is an adequate remedy at law available."[40]

25. MISSISSIPPI

> Unjust enrichment is an equitable claim and is defined as: "Money paid to another by *mistake* of fact . . . . The ground on which recovery is allowed is that one receiving money paid to him by *mistake* should not be allowed to enrich himself at the expense of the party who paid the money to him by retaining it, but in equity and good conscience should refund it."[41]

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35. Keller v. O'Brien, 683 N.E.2d 1026, 1029 (Mass. 1997).

36. Santagate v. Tower, 833 N.E.2d 171, 176 (Mass. App. Ct. 2005).

37. Kammer Asphalt Paving Co. v. E. China Twp. Schs., 504 N.W.2d 635, 640 (Mich. 1993) (quoting Restatement of Restitution § 1 (1937)).

38. Belle Isle Grill Corp. v. City of Detroit, 666 N.W.2d 271, 280 (Mich. Ct. App. 2003).

39. ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc., 544 N.W.2d 302, 306 (Minn. 1996).

40. *Id.* at 305.

41. Willis v. Rehab Solutions, PLLC, 82 So. 3d 583, 588 (Miss. 2012) (quoting Union Nat'l Life. Ins. Co. v. Crosby, 870 So. 2d 1175, 1180 (Miss. 2004)). The court also labeled this

26. MISSOURI

"Unjust enrichment requires a showing that: '(1) [the plaintiff] conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under inequitable and/or unjust circumstances.'"[42]

27. MONTANA

"The doctrine of unjust enrichment represents an equitable means of preventing one party from benefitting from his or her wrongful acts and requires a showing of misconduct or fault to recover."[43]

28. NEBRASKA

> Appellants' remaining claims seek money for unjust enrichment that Visa and MasterCard allegedly received from the purportedly inflated prices for retail goods that appellants paid. To recover on such a claim, the plaintiff must show that (1) the defendant received money, (2) the defendant retained possession of the money, and (3) the defendant in justice and fairness ought to pay the money to the plaintiff.[44]

29. NEVADA

The Nevada Supreme Court implied that recovery based on the "doctrine of unjust enrichment" was required where one person possessed money or property, which "in good conscience and justice" should be paid or delivered to another.[45]

30. NEW HAMPSHIRE

"A plaintiff is entitled to restitution for unjust enrichment if the defendant received a benefit and it would be unconscionable for the

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unjust enrichment claim as one for money had and received. *Id.* This case therefore leaves open a question of the general applicability of the state's unjust enrichment claim.

42. Hargis v. JLB Corp., 357 S.W.3d 574, 586 (Mo. 2011) (en banc) (quoting Howard v. Turnbull, 316 S.W.3d 431, 436 (Mo. Ct. App. 2010)).

43. LeFeber v. Johnson, 209 P.3d 254, 260 (Mont. 2009).

44. Kanne v. Visa U.S.A. Inc., 723 N.W.2d 293, 302 (Neb. 2006). In earlier decisions, the Nebraska Supreme Court also identified this as a money-had-and-received claim. This case therefore leaves open a question of the general applicability of the state's unjust enrichment claim.

45. LeasePartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975, 942 P.2d 182, 187 (Nev. 1997).

defendant to retain that benefit."[46] However, the Supreme Court of New Hampshire in a recent decision recited this language, but added the following: "[A]nd unjust enrichment generally does not form an independent basis for a cause of action."[47]

31. NEW JERSEY

> To establish unjust enrichment, a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust. The unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights.[48]

32. NEW MEXICO

"To prevail on a claim for unjust enrichment, 'one must show that: (1) another has been knowingly benefitted at one's expense (2) in a manner such that allowance of the other to retain the benefit would be unjust.'"[49]

33. NEW YORK

The New York Court of Appeals has stated that in order to allege an unjust enrichment claim, "[a] plaintiff must show 'that (1) the other party was enriched, (2) at that party's expense, and (3) that "it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered."'"[50]

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46. Nat'l Emp't Serv. Corp. v. Olsten Staffing Serv., Inc., 761 A.2d 401, 406 (N.H. 2000).

47. *See* Gen. Insulation Co. v. Eckman Constr., 992 A.2d 613, 621 (N.H. 2010). The court failed to explain the meaning of "an independent basis for a cause of action," but its source for that quote went on to explain that restitution is not warranted if services or benefits are provided gratuitously or officiously. *See* 42 C.J.S. *Implied Contracts* § 10 (2007).

48. VRG Corp. v. GKN Realty Corp., 641 A.2d 519, 526 (N.J. 1994) (citations omitted).

49. City of Rio Rancho v. Amrep Sw. Inc., 260 P.3d 414, 428–29 (N.M. 2011) (quoting Ontiveros Insulation Co. v. Sanchez, 3 P.3d 695, 698 (N.M. Ct. App. 2000)).

50. Mandarin Trading Ltd. v. Wildenstein, 944 N.E.2d 1104, 1110 (N.Y. 2011) (second alteration in original) (quoting Citibank, N.A. v. Walker, 787 N.Y.S.2d 48, 50 (N.Y. App. Div. 2004), *abrogated on other grounds by* Butler v. Catinella, 868 N.Y.S.2d 101, 101 (N.Y. App. Div. 2008)); *see* Bigio v. Coca-Cola Co., 675 F.3d 163, 176–77 (2d Cir. 2012) (New York and Georgia law both require for a claim of unjust enrichment that the plaintiff show the defendant obtained a benefit at his expense and that equity and good conscience require the defendant to return it to the plaintiff).

34. NORTH CAROLINA

> In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable.[51]

"Under a claim for unjust enrichment, a plaintiff must establish certain essential elements: (1) a measurable benefit was conferred on the defendant, (2) the defendant consciously accepted that benefit, and (3) the benefit was not conferred officiously or gratuitously."[52]

35. NORTH DAKOTA

"Unjust enrichment requires: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) an absence of justification for the enrichment and impoverishment; and (5) an absence of remedy provided by law."[53]

36. OHIO

After noting that restitution was the remedy used to prevent unjust enrichment, the Ohio Supreme Court stated that to obtain restitution, one "must demonstrate (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment ('unjust enrichment')."[54]

37. OKLAHOMA

> Unjust enrichment is a condition which results from the failure of a party to make restitution in circumstances where it is inequitable; i.e. the party has money in its hands that, in equity and good conscience, it should not be allowed to retain. Where the plaintiff has an adequate

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51. Booe v. Shadrick, 369 S.E.2d 554, 556 (N.C. 1988).
52. Primerica Life Ins. Co. v. James Massengill & Sons Constr. Co., 712 S.E.2d 670, 677 (N.C. Ct. App. 2011).
53. Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc., 680 N.W.2d 634, 642 (N.D. 2004).
54. Johnson v. Microsoft Corp., 834 N.E.2d 791, 799 (Ohio 2005).

> remedy at law, the court will not ordinarily exercise its equitable jurisdiction to grant relief for unjust enrichment.[55]

38. OREGON

The Oregon Supreme Court has described the elements of a substantive unjust enrichment claim as the basis of the remedy of constructive trust. The plaintiff must show that the defendant obtained her property under circumstances that made his possession wrongful or inequitable.[56]

39. PENNSYLVANIA

"Where one party has been unjustly enriched at the expense of another, he is required to make restitution to the other. In order to recover, there must be both (1) an enrichment, and (2) an injustice resulting if recovery for the enrichment is denied."[57]

40. RHODE ISLAND

A claim for unjust enrichment consists of three elements: (1) the plaintiff must confer a benefit on the defendant, (2) the defendant must appreciate the benefit, and (3) the defendant must accept the benefit in such circumstances that it would be inequitable to retain the benefit without paying the value thereof.[58]

41. SOUTH CAROLINA

> To recover on a theory of restitution, the plaintiff must show (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value.[59]

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55. Harvell v. Goodyear Tire & Rubber Co., 164 P.3d 1028, 1035 (Okla. 2006) (footnote omitted).

56. *See* Tupper v. Roan, 243 P.3d 50, 58 (Or. 2010) (en banc).

57. Meehan v. Cheltenham Twp., 189 A.2d 593, 595 (Pa. 1963). This statement was quoted and used in *Ira G. Steffy & Son, Inc. v. Citizens Bank of Pa.*, 7 A.3d 278, 283 (Pa. Super. Ct. 2010).

58. *See* Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 99 (R.I. 2006).

59. Sauner v. Pub. Serv. Auth., 581 S.E.2d 161, 167 (S.C. 2003).

42. SOUTH DAKOTA

"For [the plaintiff] to prevail on his claim of unjust enrichment, he must show: (1) [the defendant] received a benefit; (2) [the defendant] was aware he was receiving a benefit, and (3) that it is inequitable to allow [the defendant] to retain this benefit without paying for it."[60]

43. TENNESSEE

> [W]e conclude that to recover for unjust enrichment, a plaintiff need not establish that the defendant received a direct benefit from the plaintiff. Rather, a plaintiff may recover for unjust enrichment against a defendant who receives *any* benefit from the plaintiff if the defendant's retention of the benefit would be unjust. Our conclusion is consistent with other jurisdictions that have also concluded that the benefit received by a defendant need not be direct to establish an unjust enrichment claim.[61]

44. UTAH

> A claim for unjust enrichment in Utah requires proof of three elements: "(1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value."[62]

45. VERMONT

"In evaluating unjust-enrichment claims, courts consider 'whether, in light of the totality of circumstances, it is against equity and good conscience to allow defendant to retain what is sought to be recovered.'"[63]

46. VIRGINIA

> To state a cause of action for unjust enrichment, [the plaintiff] had to allege that: (1) he conferred a benefit on [the defendant]; (2) [the defendant] knew of the benefit and should reasonably have expected

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60. Hofeldt v. Mehling, 658 N.W.2d 783, 788 (S.D. 2003).

61. Freeman Indus., LLC v. Eastman Chem. Co., 172 S.W.3d 512, 525 (Tenn. 2005).

62. Rawlings v. Rawlings, 240 P.3d 754, 763 (Utah 2010) (quoting Jeffs v. Stubbs, 970 P.2d 1234, 1248 (Utah 1998)).

63. Savage v. Walker, 969 A.2d 121, 124 (Vt. 2009) (quoting Legault v. Legault, 459 A.2d 980, 984 (Vt. 1983)).

> to repay [the plaintiff]; and (3) [the defendant] accepted or retained the benefit without paying for its value.[64]

47. WASHINGTON

After finding that unjust enrichment was the modern phrase for quasi-contracts or contracts implied in law, the Washington Supreme Court stated that "the elements of a contract implied in law are: (1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment."[65]

48. WEST VIRGINIA

The Supreme Court of Appeals of West Virginia allows a general right to restitution upon proof that the defendant has mistakenly paid money to another, and justifies that remedy on the conclusion that the payee would be unjustly enriched under those circumstances.[66]

49. WISCONSIN

> [T]he essential elements of quasi contract entitling one to judgment for unjust enrichment are: 1. A benefit conferred upon the defendant by the plaintiff; 2. Appreciation by the defendant of the fact of such benefit; 3. Acceptance and retention by the defendant of such benefit, under circumstances such that it would be inequitable to retain the benefit without payment of the value thereof.[67]

50. WYOMING

> One who seeks relief based on unjust enrichment must prove all of the following four elements: (1) Valuable services were rendered, or materials furnished, (2) to the party to be charged, (3) which services or materials were accepted, used and enjoyed by the party to be charged, and (4) that the services or materials were furnished under such circumstances as would reasonably notify the party to be

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64. Schmidt v. Household Fin. Corp., II, 661 S.E.2d 834, 838 (Va. 2008).

65. Young v. Young, 191 P.3d 1258, 1262 (Wash. 2008) (en banc).

66. *See* Hill v. Stowers, 680 S.E.2d 66, 75 (W. Va. 2009).

67. Lawlis v. Thompson, 405 N.W.2d 317, 319 (Wis. 1987) (quoting Nelson v. Preston, 55 N.W.2d 918, 920 (Wis. 1952)); *see also* Staver v. Milwaukee Cnty., 712 N.W.2d 387, 393 (Wis. Ct. App. 2006).

charged that the plaintiff, in rendering such services or furnishing such materials, expected to be paid by the party to be charged.[68]

68. Nuhome Invs., LLC v. Weller, 81 P.3d 940, 948 (Wyo. 2003).